Supreme Court, U.S.
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No. 85-5487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL MARNELL SMITH,
Petitioner,

v.

ALLYN R. SIELAFF, Director,
Virginia Department of Corrections,
Respondent.

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI
FILED SEPTEMBER 24, 1985
CERTIORARI GRANTED OCTOBER 21, 1985

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RELEVANT DOCKET ENTRIES

Proceedings		
1982		
June 30	1	Order filing complaint in forma pauperis; substituting respondent; and directing the respondent answer within 23 days, entered June 28, 1982.
June 30	2	Motion for leave to proceed in forma pauperis.
June 30	3	Affidavit in support of motion for leave to proceed in forma pauperis.
June 30	4	Petition for stay.
June 30	5	Petition for writ of habeas corpus.
June 30	6	Order lodging petition and directing petitioner to submit fp certification within 20 days, JTT, U.S. Mag.
July 12	7	Motion for appointment of counsel on behalf of petitioner.
July 28	—	Answer *lodged*.
1984		
Mar. 7	8	Magistrate's preliminary report, entered and filed Mar. 6, 1984. JTT, Mag.
Mar. 6	9	Answer.
April 2	10	Magistrate's second preliminary report, entered and filed Mar. 30, 1984, JTT, U.S. Mag.
April 9	11	Magistrate's third preliminary report, entered Apr. 6, 1984 and filed Apr. 9, 1984. JTT, U.S. Mag.
June 21	12	Memorandum of law on behalf of plaintiff.
July 18	13	Memorandum of law on behalf of respondent.
Sept. 4	14	Magistrate's Report and Recommendation, entered and filed Aug. 31, 1984. JTT, U.S. Mag.

RELEVANT DOCKET ENTRIES

Proceedings		
Aug. 31	15	Memorandum of law on behalf of plaintiff.
Aug. 31	16	Memorandum of law on behalf of respondent.
Sept. 17	17	Exceptions to Magistrate's report on behalf of petitioner.
Dec. 4	18	Order denying and dismissing petition and entering judgment in favor of respondent; noting appeal procedures and declining to issue a certificate of probable cause for appeal.
Dec. 4	19	Judgment dismissing petition entered by the Clerk Dec. 4, 1984.
Jan. 3	20	Notice of appeal on behalf of petitioner.

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF WILLIAMSBURG
AND COUNTY OF JAMES CITY

COMMONWEALTH

v.

MICHAEL MARNELL SMITH

ORDER

Now comes the defendant, by counsel, and moves the Court that Dr. Wendell J. Pile, a physician being skilled in the diagnosis of insanity, be allowed to examine the Defendant, MICHAEL MARNELL SMITH, and make a written report to the Court, the Attorney for the Commonwealth and the attorney for the defendant as to his opinion of the mental condition of the defendant at the time of the alleged offense and his mental condition at the time of examination.

It is therefore ordered that Dr. Wendell Pile make a examination of MICHAEL MARNELL SMITH within the next 10 days and report to the Court, Attorney for the Commonwealth and the attorney for the defendant in writing within 15 days his opinion of the mental condition of the said MICHAEL MARNELL SMITH at the time of the alleged offenses and his mental condition at the time of examination.

It is further ORDERED that the appointed physician shall be compensated pursuant to Section 19.2-175 of the Code of Virginia, as amended.

The aforesaid examination may be made at the Williamsburg City Jail or at the office of the above named physician and the Sheriff of the Williamsburg City Jail is hereby authorized and directed to make arrangements for any necessary transportation of the accused to and from the physician's office.

ENTER THIS 28th DAY OF SEPTEMBER, 1977.

/s/ _____
JUDGE

I ask this:

/s/ David F. Pugh, p.d.
DAVID F. PUGH
STONE, BLAND AND WOOD
Drawer H B
Williamsburg, Virginia 23185

SEEN:

/s/ W. L. Person, Jr.
W. L. PERSON, JR.
Commonwealth Attorney

**CIRCUIT COURT OF WILLIAMSBURG
AND COUNTY OF JAMES CITY**

**Testimony of Dr. Wendell Pile
November 3, 1977**

[928] DOCTOR WENDELL PILE, called as a witness by the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PERSON:

Q. Will you state your name and occupation and profession, please?

A. Doctor Wendell Pile; I'm a psychiatrist at Hampton, Virginia.

Q. And how long have you been a psychiatrist, Doctor Pile?

A. I have been a psychiatrist since 1976—1946.

Q. Could you briefly tell the ladies and gentlemen of the jury your background in regard to education?

A. I'm a graduate of the University Illinois Medical School in 1945, received my psychiatric training at Perry Point University Hospital, Eastern State Hospital, in Virginia, and received my boards in psychiatry in 1952; been in private practice of psychiatry since 1952, and past Director of the Mental Hygiene Clinic in Newport News. Now Medical Director of Bayberry Psychiatric [929] Hospital.

Q. Now, pursuant to an order of this Court, did you conduct an examination of the Defendant, Michael Marnell Smith?

A. I did.

Q. Is he in the Courtroom?

A. He is.

Q. Will you point him out to the ladies and gentlemen of the jury?

A. The gentleman to my left, over there (indicating).

COURT: Let the record show he pointed to the Defendant.

BY MR. PERSON:

Q. Did you talk to him in Hampton, Virginia?

A. I did.

Q. Do you remember what date you talked to him?

A. It was October the 1st.

Q. Did he tell you anything about the girl on the school bus?

A. He did.

Q. What did he say about that?

[930] A. He said —

MR. PUGH: Your Honor, I have a motion, if your Honor please, with respect to the—what further testimony the Doctor is going to—

COURT: All right. Take the jury out.

(At this time, ~~the~~ jury retired to the jury room.)

COURT: All right, sir.

MR. PUGH: Your Honor, we're going to object to any testimony made by Doctor Pile with respect to a case involving or an incident involving the Defendant at sometime prior to the offense for which he's charged.

COURT: Well, Mr. Pugh—

MR. PUGH: As well as the fact that—I think that the Commonwealth has to lay the foundation as to what the Doctor instructed [931] Mr. Smith with respect to his rights to say anything to him.

COURT: I don't think the Doctor is an officer of the law; and certainly let me point out, first of all, Mr. Pugh, Doctor Pile was appointed at your suggestion to examine this man. You suggested Doctor Pile, as I recall it. Following your suggestion, I appointed him to examine this man.

MR. PUGH: That's not the question in issue.

COURT: If you will let me finish, Mr. Pugh, and I'll let you finish.

You, having done this, and Mr. Smith having talked to him, I don't believe that Doctor Pile has any duty to inform him that anything he may say to him may be used for or against him in a Court of Law, as a police [932] officer does under the Miranda.

Secondly, as I interpret Section 19.2-22-64.4, it clearly reads "evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant."

Now, how—how is history and background obtained? The man writes his own history. Sometimes with his words and sometimes with his deeds, but he writes his own history. And whatever he says, whatever he says he did, that's one of the ways of knowing history. Certainly—I think what he said to Doctor Pile is admissible.

What else do you want to say?

MR. PUGH: I don't have any further statement or [933] comment on that. I just object.

COURT: Note—

MR. WOOD: I do have one brief matter in regards to another matter.

COURT: All right.

MR. WOOD: The Doctor—has written a letter, as the Court knows, to the Court, of course, we got copies of it.

COURT: Yes sir.

MR. WOOD: And a comment was made in his letter in regards to any other previous rapes, and the comment that was made in his letter was that his lawyers had told him not to comment on anything like that.

MR. PERSON:—I'm not going to—

MR. WOOD: Or words to that effect. I don't believe it would be proper for the Doctor to say that.

[934] MR. PERSON: I'm not going to ask him that question.

COURT: I agree with you, Mr. Wood.

Any reference to what lawyers may have—what he said with reference to what lawyers may have told him, Doctor Pile, would not be proper to tell to the jury.

MR. WOOD: Yes sir.

COURT: Your exception will be noted, Mr. Pugh.

(At this time, the jury returned to the Courtroom and resumed their seats in the jury box.)

(The Defendant was present, seated at counsel table.)

BY MR. PERSON:

Q. Tell us what he told you, Doctor Pile.

A. He explained that he was driving [935] a school bus. That he came close to assaulting a girl. He tore her clothes off, but then thought better of raping her, and did not do so.

MR. PERSON: That's all the questions I have.

COURT: All right. You may cross examine him, Mr. Pugh.

CROSS EXAMINATION

BY MR. PUGH:

Q. Doctor Pile, you indicated—you stated that you saw Michael Smith on October the 1st, is that correct?

A. Right.

Q. And how long a period of time did you converse with Michael Smith?

A. I imagine about an hour. Usually my consultation is an hour.

Q. Did you see him after that date?

A. I did not.

MR. PUGH: Just a moment.

(At this time, [936] Mr. Pugh and Mr. Wood conferred.)

MR. GROSS (JUROR): When this incident that he described to the Doctor take place?

COURT: Did he advise you, Doctor, when it had taken place?

A. While he was driving a school bus. I assume it was at a younger age, but I don't know the exact time.

BY MR. PUGH:

Q. Doctor Pile, in your diagnosis, what was your diagnosis of Michael Smith?

A. I felt he was a sociopathic personality, sexual deviation, rape.

Q. What is that?

A. A person who—is also described as an antisocial personality. They're all sort of the same type of—of personality disorder. The basically people who are unsocialized, and they're quire repeatedly in conflict with the Court. They don't seem to have any capability of—of having loyalty to anybody, to any group or to any social values. Usually, they're rather irrespon[937]sible. They seem to feel no guilt, and they don't seem to learn from either experience or punishment. They seem to particularly have no feelings or standards what's right and what's wrong.

Q. Do they have compulsions to commit crimes, Doctor?

A. They will commit crimes, but it need not be a compulsion. They just have no—they want to do what they want to do, irrespective of what the laws of the land are. Basically, they do what they will do to get—enjoyment.

Q. Over what period of time, if a person has this antisocial personality, what period of time would be a person develop this behavior? Is it a year or two years or—

A. No, frequently you see this start when they're in adolescence, and—it's something that—develops around the time of puberty, usually, but you can see it come out at other times.

Q. Would you categorize this as being an—an emotional illness or sickness?

A. It's a—form of a—personality disorder or an—inadequate personality that has nothing to do with whether he knows he difference between right and wrong, for instance. He does. But it's a—a person who [938] is not like, I assume, most of us here, but he—it's a personality disorder.

Q. Well, do we have that personality disorder, the typical person?

A. The typical person does not, no.

Q. It's not average?

A. No, it's not.

Q. What type of treatment is available for a person with this type of disorder?

A. Well, this is the type of person who is usually seen in Courts on trial, and when they're adjudged to be not insane, to know what they're doing, they're usually treated as a criminal, and the Court takes care of the punishment.

Q. Let me—

COURT: Let him finish now, Mr. Pugh.

A. There are, of course, cases who, with a personality disturbance, they are, hopefully, they can be some help in changing a personality; and a person like this, an attempt is made with psychiatric help and maximum security type prison or hospital, to see if something can be done.

BY MR. PUGH:

Q. Would be your recommendation for [939] treatment—

MR. PERSON: Judge, let me take something up outside.

COURT: Ladies and gentlemen.

(At this time, the jury then retired to the jury room)

MR. PERSON: Judge, the ultimate issue in this whole case is life or death and I would object to—to the—Doctor Pile giving his opinion whether the man should be given life or given death.

COURT: Of course. Of course.

MR. PERSON: That's the reason. They asked him what his recommendation would be and I would assume that was the question he was eliciting.

MR. PUGH: I withdraw the question, Judge.

[949] COURT: All right.

(At this time, the jury returned to the Courtroom and resumed their seats in the jury box.)

(The Defendant was present, seated at counsel table.)

COURT: Any further questions?

MR. PUGH: Yes.

BY MR. PUGH:

Q. Doctor, what causes a disorder of the type you diagnosed Mr. Smith had?

A. I'm sure there are a lot of theories, what causes this type of condition, and—I don't think there's any one that really

knows. Like a lot of psychiatric conditions, we know the symptoms, and unfortunately we don't know the cause for a lot of them. And—in this particular case, I would have no idea what the cause might be for this particular problem.

MR. PUGH: That's all I have.

COURT: Any further [941] questions of the Doctor?

MR. PERSON: No sir.

COURT: Any futher need for the Doctor?

MR. PERSON: No sir.

COURT: Doctor Pile, you may be excused.

MR. PERSON: Thank you, Doctor.

COURT: Who is next witness?

MR. PERSON: Doctor Dimitris.

Testimony of Dr. James C. Dimitris
November 3, 1977

DOCTOR JAMES C. DIMITRIS, called as a witness by the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PERSON:

Q. State your name, please, sir.

A. James Christian Dimitris. The [942] spelling is D-I-M-I-T-R-I-S.

Q. What's your occupation or profession, Doctor?

A. I'm a physician, psychiatrist. I'm Director of the Criminal Division of Psychiatry at Central State Hospital in Petersburg.

Q. Would you tell the ladies and gentlemen of the jury a little bit about your education?

A. Yes sir. I completed my studies in medicine at the National University in Athens, Greece in 1955. From 1955 to 1960, I specialized in the field of internal medicine, and at the same time I completed my duties to military service of the country. In 1960, December, 1960, I immigrated to Montreal, Canada, where a—I again went through internship in various French and Canadian hospitals of the Montreal area for two and a half years. Subsequently, I passed the educational board, exams for foreign medical graduates. In 1963, I came down to Suffolk, Virginia, where I practiced in the field of general practice for two years. During that time, I passed the State Board of Maine and the State Board of Virginia in medicine; and in 1965, I enrolled into the field of psychiatry at the Medical College of Virginia Hospital in Richmond. This is a three year program, which I completed in 1968. From 1968 to date, I have been working at Central [943] State Hospital in Petersburg, Virginia, in the field of criminal psychiatry. Up to '72 as assistant director of the unit, and from '72, from '72 on as director of the unit.

I have also published some work in the field of insanity, published in—the Virginia Bar Association magazine, in June, '75. Along with—Mr. Thistem, who is a substitute judge in Lancaster, Virginia.

Q. Doctor Dimitris, did you have an occasion to examine Michael Marnell Smith?

A. Yes sir.

Q. Would you identify him, for the record? Is he sitting in the Courtroom?

A. The gentleman sitting next to the Defense Attorneys.

Q. All right. Did he come to Central State, pursuant to a Court order?

A. Yes sir, issued by the General District Court. For the record, I can tell the date we received the order. July 1st, 1977, by Judge Zepkin.

Q. And how long did he stay at Central State?

A. From July 5th of this year to August 23.

[944] Q. And did you have an opportunity to examine and talk to him during this time, and observe him?

A. Yes, if I may explain, for the benefit of the jury, our process. When we receive a person under the order of the Court, he's undergoing physical examination, laboratory exams, pertaining to his physical condition. Then we have around the clock observation in three shifts of the place that he's housed at, and he's undergoing psychiatric interviews and also psychological testing. Occasionally, we have also the benefit of other examinations which have been done prior to that mission, or some other time earlier, with the person who was in need of other examinations or treatment. So this has been accomplished.

Q. All right. Now, and he was sent to you to obtain your opinion as to whether he knew right from wrong, is that correct, and whether he was competent to stand trial?

A. Right. The question of the Court was what was his condition, if he was able to establish right from wrong, and, of course, the condition of the time, at the time of the alleged offenses.

Q. Now, were you also provided with a statement that he allegedly made in regards to this [945] particular case?

A. Yes, this is part of the record, also.

* * *

Q. Now, I show you the statement of Michael Marnell Smith, and ask you whether or not, in regard to this case, and ask you whether or not you have a copy of that statement? If you would check that against your copy.

(At this time, the witness perused the document.)

A. Yes, it seems to me that is the exact copy of what I have in my files.

[946] COURT: For the record, Mr. Person, that's Commonwealth Exhibit what?

MR. PERSON: This is Commonwealth's Exhibit Fifteen in the prior hearing.

BY MR. PERSON:

Q. Now, Doctor Dimitris, based on your evaluation during this time Mr. Smith was at Central State, and based on your interviews, and based on the testing that was conducted over there, do you have an opinion as to whether or not Michael Marnell Smith was competent to stand trial?

A. Yes. Mr. Smith, the Defendant, was able to understand the charges that were pressed against him. That he was the Defendant, and that he was supposed to be tried. He had options in the trial between jury and judge trial, and if he wanted, and also that—he had awareness of what transpired during this alleged offenses. And, to our judgment, he was considered able to relate those—this information to his Defense Attorneys, to assist them for the preparation of his defense.

Q. Based on your evaluation, which consisted of observing him at the time he was at Central State, and your interviews with him, and his prior history, [947] and assuming that the statement that Michael Marnell Smith gave, of which you have a copy, are the true facts concerning what happened on May 23, 1977, assuming all that, do you have an opinion as to whether Mr. Smith knew right from wrong at that time?

A. Based on the information received from the authorities, the statement the accused had made earlier to them, the interviews at Central State, which dovetailed with what he said to the authorities, and the overall evaluation, including psychological evaluation of the accused, it is my opinion, and it is an opinion, that the accused knew the nature, quality and the consequences of his acts. To be specific with this, I mean to say that—he knew that when he was approaching the victim and was walking toward the wooded area, where the rape took

place, that he had a purpose for it. The purpose became evident when he pulled the knife and ordered the victim to comply with his wishes. He knew that sexual intercourse was taking place against the pleadings and the wishes of the victim, according to his own admission, and because of his anticipation and fear that this victim could report the event to the authorities, he proceeded to choke his victim to death. Therefore, I come to the conclusion to opine, to evident an opinion, to say that he knew what was going on, and it was his clear-cut awareness [948] and choice.

Q. And that he knew right from wrong?

A. Was aware that the activities were wrong and objected to by society.

MR. PERSON: Answer Mr. Pugh or Mr. Wood's questions.

CROSS EXAMINATION

BY MR. WOOD:

Q. Doctor Dimitris, what type of mental disorder does Michael Smith have?

A. Our evaluation at Central State indicated that the Defendant manifested signs of what we call inadequate personality. By saying so, we mean to say that the person has basically a more than the average person accentuated inferiority complex. In other words, every human being has understanding of limitations that we are not perfect, we're not omnipotent. We're weak. We try to do something about it. We try to learn better, to cope with life, to really endure through this challenge, the stresses. Some people have it in a marked more accentuated form. In other words, they feel incapable to deal with the average stresses of life unless they have some kind of compensation, some type of reassurance that they're strong, [949] they're good, successful. Maybe the element of success is what—is—impinging in their minds of these people. And to define success is something which is very, very hard to do. So,

basically, the existing, the widespread feeling of inadequacy, of weakness, of inferiority is more accentuated in some people, and then they call them inadequate personalities.

Q. Doctor, is this a mental or emotional disturbance?

A. This is included in the diagnostic manual of the American Psychiatric Association as a mental disorder.

Q. What causes this condition, Doctor?

A. The expression is that many highways lead to Rome, and many causes can lead to somebody to become—to have inferiority complex much more pronounced, much more intense than for the average person. Usually expectations of the family, being the first son of the family, for example, the father, the feminine looking up for leadership, for success. Can lead into the person's feelings of—"I don't measure up to what they expect of me. I have to do something to compensate for this vacuum." Not closeness to the father, for example, sometimes leads to this feeling, "Because the father rejects me, therefore, [950] I'm no good." Being no good is awful, you have to do something to compensate for no goodness. Many reasons can lead to the person to feel inferior and inadequate.

Q. When does the condition like this usually develop, Doctor?

A. Usually, but not necessarily, starts in the early childhood. The third, the fifth year, the sixth year of life. It's critical where the child understands the environment, understands expectations. He is able or she is able to understand how the people react and treat him or her. And at that time, feelings, though the individual starts to develop, and start, become part of his existence.

Q. You did not determine that he was a sociopath, is that correct, Doctor?

A. No sir, in our evaluation this—this was not the finding. We didn't find evidence of sociopathy.

Q. How many days did he spend with you, Doctor?

A. It was from July 5th through August 23.

Q. Doctor, in your opinion, can any psychiatrist determine that anyone is a sociopath just sitting down and talking to them for a period of an [951] hour?

A. Its possible. It depends what material comes through in this hour. The quantity is not always critical. It is essential, but not critical for the conclusion. It depends what comes through this hour. If in fifteen minutes, sometimes you can have evidence of—of a panic or mental breakdown, or you might need many, many more hours to come to the conclusion. It depends how the person interviewed cooperates with you, how frank he is or she is, and what material comes through this interview.

Q. Doctor, you're familiar with the term "garbage can diagnosis," are you not?

A. I heard it, but—I don't use it. Therefore, I'm not familiar, exactly.

Q. You know what it means, don't you, Doctor?

A. Kind of—catch twenty-two deal of lumped up and put it somewhere. This is my interpretation, but maybe I'm wrong with it. I don't know.

Q. Don't psychiatrists use sociopath when they're generally and it's generally described as what has been known as a garbage can diagnosis, that is that he couldn't really determine what the problem was, so he just sticks it under sociopath?

[952] A. I have no awareness of how other psychiatrists deal with the puzzling question of what the human being manifests and what it's all about. Maybe they come to simplifying the situation. I don't know. I haven't—no way to tell you for sure. I have heard various explanations as to how this is dealt with. I believe the person who does it has to explain what he or she does. I don't second guess others.

Q. Doctor, you're familiar that it does happen, though, aren't you, sir?

COURT: Mrs. Renz.

MRS. RENZ (JUROR): I wonder if the Doctor could explain to us why they did not determine what Mr. Smith was—a sociopath and again give us the difference in definition between a sociopath and an inadequate personality.

A. I'll be glad to. Which is the priority.

COURT: The priority is with the juror.

A. Thank you, sir.

The sociopath, ladies and gentle[953]men of the jury, is a person who is—self-centered. He's the one existing, and nobody else is. The individual is an object, is a thing. He's callous, indifferent to human suffering and—and torture. He's—getting excitement, sometimes and oftentimes, by the suffering per se. For example, he can put the house on fire, and then, instead of calling the police or anybody, he will watch firefighters doing their job and be excited out of the suffering of the firefighters and the people who evacuate the building, if they manage to do it. In other words, it's a person that is operating on the pretext if it is—if it feels good, do it. Which can—be devastating, really, to society. This is the reason they call it antisocial, which is against society, or sociopathic. He is existing; everybody else is supposed to serve his needs, his whims, his feelings.

The inadequate person is a person who tries to compensate, oftentimes, this feeling of inferiority, and go overboard for that. He can go into great risks, in the first line of operation, front line of operation. For example, this is life, risk his life, even though he is not properly covered, he's not having the chances to make it through. But he's going to go for that. This is a big thrill, a challenge. To do it, and that's when you give it, "I am somebody; I'm [954] successful; I'm useful; and I am not the little man. I'm not the almost nothing." So the inadequate

person fights his own feelings of inferiority, and he can go overboard for that in a healthy or nonhealthy way. He can prove to himself, "Otherwise I have done thus and thus, and, therefore, that proves I'm not a nothing. I'm somebody. I have raped this woman, what I have, did whatever, therefore, I am somebody. I'm better than this person who is the victim." People can switch over from—not the pigeonhole, they have to stay with it. The person as long as is not—with confusion of the mind, which we call psychotic in the psychiatric jargon, can make choices and move out of one situation to another. He's not supposed to stay rigidly with that, or he can stay, too, usually repeating himself.

So it's some kind of—substantial difference between sociopath and inadequate person. Even though there are similarities.

BY MR. WOOD:

Q. Doctor, is a sociopath likely—

COURT: Just a moment. Mrs. Robertson.

MRS. ROBERTSON (JUROR): A person can move from one to the other, is that what you're saying? [955] In other words, can a person have both those traits, both those ideas? In other words, can he have both those—

A. You can have, basically, the sociopathic trend, or can it be inadequate and be also sociopathically inclined. Nothing deprives the person to have traints of the other.

BY MR. WOOD:

Q. You determine in your diagnosis, did you not, sir, that he did not have a sociopathic traits?

A. Not only mine, it was a team evaluation. In other words, the rest of the team, psychological member of the team, my assistant, and other members of the staff through the evaulation observed, neither we found through testing that the evi-

dence of sociopathy. As human beings, we might have failed that. Don't—it's not a gospel at this.

I will tell you what we have been able to achieve and how far we could carry on the ball. This examination, we have not found clear-cut evidence of sociopathy.

Q. Doctor, so this diagnosis is not only yours, it's your whole team, is that correct?

[956] A. That's correct, sir. It is traceable through the records; it is not one man's conclusion.

Q. Doctor, is a sociopath, who has committed a crime, such as this crime, likely to confess to it and break down and cry about it?

A. That's not a cardinal—characteristic of the sociopath. Usually the sociopath try in every way to be elusive, to evade detection, to give hard time to the authorities. But I have to admit that—when the evidence is so hard against him, the sociopath might go to the other extreme and become a meek, easy going and cooperative person, because he understands that—"I have no way to fight it out. I might as well join them." Then he might break down and cry and give cooperation, because anything else is worse. So it's the better of the many evils.

Q. Without any evidence against him, is he likely to confess everything to the authorities and break down and cry?

A. Usually not.

Q. Doctor, you say this condition begins in the third, fourth, fifth years of life, is that correct?

A. Usually, but, as I say, social [957] experiences can—any time later influence the person in developing—

Q. Excuse me. Did you determine in this particular case as to what caused the mental disorder of this particular Defendant, Michael Smith?

A. No, we're not able to pinpoint exact causes to it. We were unable to understand the scars of it, so to speak, but what—situation that led into this scars, cutting with glass, with knife, with a fork, with—with any other substance, ordinarily we can't pinpoint, and say that was the reason. The fact this man is the first child out of many, twelve probably in the family, and that has a little to do with what the father was able to achieve in life, and what the first son is supposed to do. This is—not an unusual situation in few or several instances. But, as I say, looking later on scars, it's hard to characterize the cause of it.

Q. Did you determine that it was a long lasting illness, sir, I mean that it wasn't just something that came to pass in the last few years?

A. What we were able to determine, that some people it was existing and vivid. The length of it is something which—is very hard to determine, as was the causality. When you see a scar, you have to go into hypotheses, how long the scar exists, how it was [958] caused. You have no—definite valid proof to it.

Q. I understand, sir, but did you, in fact, form a hypothesis in regards to this particular case, from the history of this Defendant?

A. Our belief, our opinion is this was existing at least through adulthood from adolescence on. From adulthood on, but this is our way to understand the situation, his inadequacy. As I say, something which we cannot prove in any way through graphic or through some kind of x-ray or any other way to say yes, it was the twelfth year that led into that.

Q. To your knowledge, sir, and the prior history did you obtain from this Defendant, Michael, has he ever had any treatment before, sir?

A. No, he hever was exposed to any treatment before.

MR. WOOD: No further questions.

MRS. RENZ (JUROR): In your opinion, or did you form any opinion as to whether or not he would benefit from treatment or whether—to what extent psychiatric assistance would change this pattern of [959] behavior?

A. I'm very appreciative of this question, because that—would give me an opportunity to explain what psychiatric treatment can do for personality disorders.

As I explained earlier, personality disorder is something which part of the existence of the person, probably after the third year of life on. In other words, is a way the person feels, thinks and reacts in his every day life and his actions. Every day life business, dealings. Treatment in this case has to be an alliance or a partnership between the therapist and the therapee, between the patient and the therapist. It can always be a strong lasting existing one. It is not like somebody who goes to the surgeon and has an appendectomy, and that's over. This is something the person has established, a way to deal with life. Unless he or she believes this is not the proper one, "that I want to change," and then ask for the guidance of the psychiatrist, no result is going to come of any importance, or if any of the person understands better ways and means, there is no guarantee that definitely he is going to adhere to it.

It is a matter of determination and decision, because the person can exercise will and determination. It's not like the confused schizoprenic [960] person who doesn't know what goes on. You have to give him Stelazine, something intramuscular, to snap out of it. Here the person is not passive, but is active. Is engaging in the transaction with you, has to be in partnership. In partnership situations, there is a chance for the person to change, but at the same time it's a chance for him not to change.

MRS. RENZ (JUROR): The partnership situation would not exist unless the person, who had the disorder, was willing to really make the effort to change?

A. Yes mam.

MRS. RENZ (JUROR): It would have to be strictly in cooperation?

A. Always lasting cooperation. It is not like—making some magic for him or hypnotizing him or giving him ten shots of Thorazine and changing him. No. the medical approach that we go to the medical doctor, and he gives us a shot and—we have no tonsillitis any more, is not applicable.

BY. MR. WOOD:

Q. Doctor, you're saying if the man is [961] cooperative in this treatment, that he can benefit from treatment, is that correct?

A. Yes.

Q. I asked you all the period of time that Michael Smith was with you up at Central State, for the criminally insane, was he cooperative with you, sir, throughout that period of time?

A. Yes, we had good cooperation with the Defendant. He was a good patient. We didn't have any problem in regard to infraction of rules and regulations of the unit. Or any violent situation, you know, with his presence.

MR.. WOOD: I have no further questions.

COURT: Any redirect, Mr. Person.

MR. PERSON: Yes.

REDIRECT EXAMINATION

BY MR. PERSON:

Q. You did say there's no guarantee that he wouldn't commit the crime in the future?

A. Yes, I say that you can learn your ways and means of adopting in life, and then you can [962] opt to go back to the previous ones. It doesn't mean because you have learned to know about yourself you're going to do it. You have broader options in life to do otherwise for your feelings and inferiority.

You might decide, "I don't care for that. It suits me fine to do otherwise." This is the trouble with psychiatric treatment. It's long, vague and indefinite.

Q. And one of the ways you can decide that is what a man has done in his past life, isn't that correct?

A. I'm sorry.

Q. One of the ways you're going to decide about the future of what somebody is going to do is what he has done during his life?

A. Yes. This is—a way to understand or to anticipate actions in the future. Of course, you cannot talk in absolute terms for that either. In other words, the human being is a magnificent computer in regards to his mind. I can see a loaf of bread and plead for a slice of it. I can grab it. I can work hard to have it. I can go to the welfare to get money for it. I can go to the Salvation Army and give me a slice there. So there are many ways to deal with some stimulus, and how the human being is going to deal to stimulate in the future is very hard to predict. Psychiatry usually deals with the [963] past, to understand and modulate the better future. It is very hard to predict the future, though.

Q. Can you tell the ladies and gentlemen of the jury the difference between your diagnosis of personality disorder and insanity?

A. Insanity is a medical-legal term, which indicates that the person, because for mental illness or defect like retardation, is unable to understand the name, quality, consequences of his acts, or to understand right from wrong. Or that he is so much void of will, he's like an automation that—even though he understands right from wrong, still he cannot control his impulses.

Well, personality disorder is a mental disorder. It's something deviate from the psychiatric norm. Which says the normal person has to be able to work, love and learn. This is—our

tried in simplistic terms of health. The person has to be able to work, to learn in life, and also to live some other person except himself.

Well, from this concept of mental disorder to the point of insanity is a wide gap, because it means that the person is so much confused, so much altering his ability to think, to feel and to act, to the point that—he's not able to understand what is [964] going on with him or her. Or even if she understands, for example, the paranoid schizophrenic person is a person that has serious mental disorder, knows that pulling the trigger and shooting somebody is going to kill, but the person who is going to be killed deserves to be killed, because he is the traitor of the country. So, you see, that alteration in his mind of the proper feeling, there's no evidence to it except his own fantasy leads him to believe that this person, who is about to be killed, is a traitor. He knows it's a pistol, it's a bullet, it's going to penetrate the body and kill, but in his or her mind, this is a justifiable act.

So we don't have any alteration of that kind, of understanding reality. Reality is understood in the mind of the personality disorder, but is ignored. "So what? I want to do my thing.

COURT: Is Mr. Person through? You'll have a chance.

MR. WOOD: I know, sir.

BY MR. PERSON:

Q. Now, a person who had committed a crime, and thought that the law enforcement officials had enough evidence to convict him, if he just thought it, could be a sociopath and could tell them about it, is that [965] correct?

A. Mr. Person, you try to ask me an important question, which I don't get—would rephrase the question?

Q. Is the typical situation that a person who—in this, for instance, is this case, is it consistent with Mr. Smith, thinking that law enforcement officials had the evidence against him in the case, for him to confess?

A. Let me see if I got it straight. Well, the question is if Mr. Smith decided to confess after he felt that it was overwhelming evidence against him. It might have been so. I have no way to—to say that he was overwhelmed by the evidence or was overwhelmed by the fact that he took a life, and he did as he did that particular time. It's very hard to differentiate what is what. Maybe a little bit of both. Maybe the feeling that—it was searing in the area he was living at, at that time was crucial. In other words, no specific reason for something. In other words, there might be a gathering of his amalgamation. There were many reasons to go lead to his decision.

Q. There could be many reasons for that, is that correct?

A. Yes.

[966] **RECROSS EXAMINATION**

BY MR. WOOD:

Q. Mr. Person asked you a question about a guarantee, about future conduct. Future criminal activity. Doctor, you can't guarantee that anyone in this room is not going to commit a criminal crime in the future?

A. No.

Q. And in regards to this judging what's going to occur in the past, that Mr. Person related, by what's happened in the past, I'm sorry, judging what's going to happen in the future by what's happened in the past, without treatment interjected into that history, that wasn't a relative judge for the future, is that correct? Do you see what I'm saying?

A. You interject the element of treatment as a crucial point in making a difference for the future?

Q. Yes sir.

A. Yes, the only thing that—as I say, the commitment of the person to—is the difference. This can be achieved with the help of minister, the help of social worker, any person that will

be in alliance with the person, who will determine, who is determined to make a difference, can make the difference. [967] Yet the difference would be what comes out of their awareness. You can be tremendously impressed, like, for example, you know that you have pneumonia, and then you opt to go out and have a walk with just your shirt, nothing but that. You feel, "I feel fine. I don't want my overcoat. I don't want to do the new things you tell me. I know about it, but still I want to do things my way."

MR. WOOD: I have no further questions of the Doctor.

MR. PERSON: I have one more.

REDIRECT EXAMINATION

BY MR. PERSON:

Q. Most people who commit rape and most people who commit murder, rape and murder together, have at least a personality disorder, is that correct?

A. Yes sir, if it's a trend of life; in other words, it's not just something which—happened because they got intoxicated and then they got confused, they didn't know what was going on. They're sober; they're well placed together person, who will decide to do that, [968] time and again, it seems that has to have some personality disorder. Something make them tick.

MR. PERSON: No further questions.

RECROSS EXAMINATION

BY MR. WOOD:

Q. Doctor, then the answer, as I understand it, to Mr. Person's question, is that most persons, who commit rape and murder, have personality disorders, the answer is no, is that correct?

A. I said yes.

Q. Yes, with the further condition that it's a—a previous pattern involved with that person, is that correct?

A. Usually, it's a pattern of activity.

Q. But a person who gets out and commits rape and murder, with no prior history or pattern of that particular action, does not have a personality disorder, necessarily?

A. Not exclusively.

Q. I understand.

A. Not exclusive.

[969] Q. Necessarily, he doesn't have to have a personalithy disorder?

A. Not exclusive.

REDIRECT EXAMINATION

BY MR. PERSON:

Q. When you reviewed the Defendant's history, there was a pattern of this, is that correct?

A. Yes sir. It's an element of tendency to be involved in at least that sexual aspect of this behavior with some tendency either for the part which came about, which is the murder.

Q. And did you—as far as your history, did you know that he had been convicted of rape prior to this?

A. Yes sir.

Q. And was that taken into consideration when you evaluated this thing?

A. Yes sir, he told me that, and he told me that he was, you know—just a parolee from the system.

Q. And is your—have you had an opportunity to review the facts of the first rape in reaching your conclusion today?

[9670] A. I have seen the statement of the first offense.

Q. And what was that?

A. As to—the events pertaining to the rape and the pleading of the victim not to be—killed and this. For some reason didn't take place.

Q. So there is a pattern?

A. It is a pattern. It's repetitious behavior. It happened three years ago. It happened now. Now, if that's going to happen continuously or not, you have to go into statistics and possibilities. If you talk about an individual versus statistics, it's—that is what makes the difference.

Q. But it's a better chance it will happen again with a man who has committed two rapes than a man who hasn't committed any, is that correct?

A. It's a better chance. It's a good chance for the person to repeat himself, but there's a good chance that the person can change.

MR. PERSON: That's all the questions I have.

RECROSS EXAMINATION

BY MR. WOOD:

[971] Q. It's a lot better chance when there isn't any treatment between the first rape and second rape, too, isn't there, Doctor?

A. The first rape and the second rape?

Q. Yes.

A. Again, I have to be vague in talking chances. I'm talking about a human being with many possibilities. I don't try to be evasive. I have to admit the limitations of the trade. Of our science. The human being is a measure of the human race. It is something which—you don't have a way to say yes, because a person has done it before is going to be for sure again, the same

thing. It's a chance. As far as we can say. We cannot go more than that.

Q. Doctor, the response to Mr. Person's question was based on generalities, was it not, sir?

A. On statistics.

Q. On statistics, the person who committed rape is more likely to commit it in the future?

A. Yes.

Q. Basing that on generalities in statistics, isn't it more likely chance the person would have had treatment after the first rape?

[972] A. It's a good chance with treatment, which I explained what kind of treatment. Not a shot and miracle. This type of treatment, the person will snap out of this trend and become different. So—I'm sorry, I'm talking about chances, but this is as far as I can go and explain.

Q. And even more so, Doctor, when the person is cooperative, is that correct, in this treatment?

A. As long as the person is in alliance and believes in his goal, is the partner, as I said, the chances always are much better.

MR. WOOD: No further questions at this time.

COURT: Any further questions?

MR. PERSON: You said the chances are much better if he cooperates?

A. Yes.

MR. PERSON: That's all.

COURT: Any further questions?

MR. WOOD: No sir.

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CIRCUIT COURT FOR THE CITY OF WILLILAMSBURG & COUNTY OF JAMES CITY

Closing Arguments And Instructions To The Jury At Sentencing Phase, November 3, 1977

[1069] MR. PERSON: May it please the Court and ladies and [1070] gentlemen of the jury, we've come down to the time now where you all have got to decide between death or life. Whether the Commonwealth has proven—let me say this. The Court has instructed you, the Court has said to you that you may fix his punishment at death, number one, if there is—if the Commonwealth has proved beyond a reasonable doubt that there is a probability, based upon the evidence of the prior history of the Defendant, that he would commit criminal acts of violence that would constitute a continuous serious threat to society. So what has the Commonwealth proved about his prior history?

And the reason I read that instruction, when we all started this thing, I asked you all on Monday, and I asked you this morning, whether any of you [1071] all had any scruples about fixing death. Any conscientious or moral scruples. All of you said you didn't. Some of you said it would be difficult and painful, and there's no doubt that it is difficult and painful. But I ask you, I ask you to remember what the evidence was, the evidence that you heard this morning. All of it, the Commonwealth's and the Defendant's. Think back about it, and, as I said yesterday, we're sitting in this room free without fear or threat, with the history of this man, sitting over here, the history that he's made himself is one of terror.

Now, as I said, you all, the Court has instructed you that you all may fix his punishment at death, if the Commonwealth proved its case—proved the prior history that he would commit [1072] criminal acts of violence that would constitute a continuous serious threat to society. Now, what has the Common-

wealth proved? The Commonwealth has proved that prior to the crime you all convicted him of yesterday, that he assaulted a person on the bus. He said he did it. He says he did it. Tore her clothes off, and then decided not to do it. The second thing he did, in his history, is he committed rape. Was sentenced to twenty-five years with fifteen suspended, served approximately three, was out three months, and raped and murdered Audrey Weiler.

Now, Doctor Pile was asked, I didn't ask him. All I asked him was about the acts that were committed on the bus. Mr. Wood or Mr. Pugh asked him about his diagnosis. Certainly Doctor Pile and Doctor Dimitris agree on their diagnosis. I didn't ask [1073] Doctor Pile was his diagnosis was. They did. They said—he said he was a sociopath. And that a sociopath did things and didn't care what the law was. Selfish, did it to satisfy himself. Doctor Dimitris says the same thing. Basically, when you look at it in human relationship, he's saying the same thing. He says he certainly didn't have a normal behavior.

Well, I would certainly agree with that. He certainly doesn't have a normal behavior. But whose fault is that? Are we going to justify this, blame it on society, blame it on his family? I blame it on him. Audrey Weiler blames it on him. The first rape victim blames it on him.

And I would say to you that you can give him and should give him a death sentence based on that evidence, and you can do [1074] it solely on that evidence. His prior record. Or you'll read the instruction, or you can impose the death sentence on him for what he did to Audrey Weiler. Because you can find that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

Now, it's just overwhelming that the crime was outrageously vile, horrible, inhuman, in that it involved an aggravated battery. I don't know if you can have a worse crime. You saw the pictures. He killed her in three ways. And you've heard me say it enough. By choking, with the knife, and by drowning. So I

say to you that it's under your oaths as jurors that this is a proper case for the death penalty. This is a proper [1075] case. The Commonwealth is not asking for a death penalty based on one or the other. We could, but we've proved both things, not only has his life been vile, that his history shows that he will continue to kill and murder and rape, but that this last episode was so terrible, and that's why you should give him the death penalty.

And you are instructed to look at the mitigating circumstances that would not justify the death sentence. Well, I ask you to look at his evidence and if there's anything mitigating about it, I would submit to you under the evidence, I have not seen it. Not when you balance it against what he did. And we can't forget what he did.

He does have a good [1076] family. He was brought up in a good family. His father is a good man. He worked on the dairy farm. He was a good worker. He drove a bus well, but what in the world does that have to do with raping and killing Audrey Weiler or raping a girl three or four years ago and assaulting another girl. What in the world does that have to do with it. Now, if that mitigates it, so be it. He had more advantage than most, really.

And these character witnesses, they were telling the truth. I have no argument there. They said as far as they knew, he was a good guy. Real good guy. But you didn't hear Audrey Weiler. You didn't hear the victim of the other rape. They didn't testify.

The Court has instructed you that the mitigation in a capital offense may include, but [1077] shall not be limited to the following. Capital felony, and I'm just asking you to follow the law in this case. That's the oath that you took. We wouldn't be even hearing this capital case today unless he believed in capital punishment himself. You understand that, don't you? The Defendant believes in capital punishment, because he executed Audrey Weiler without a trial. He executed her because he raped her. That's why we're here.

Let's see what the Court says about mitigation. The facts in mitigation may include but shall not be limited to the following. Capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. Have you heard any testimony whatsoever of extreme mental or emotional [1078] disturbances. Absolutely none. Doctor Dimitris, who examined him, said he knew exactly what he was doing on that day. That he had one purpose when he went down there on that beach, and that was to rape and that was to kill her, so that she couldn't identify him. That he knew the difference between right and wrong, and he understood the consequences of his act.

Number two. Another mitigation may include. At the time of the commission of the felony, the capacity of the Defendant, Michael Smith, to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired. Have you heard any evidence about that, about it being impaired? He had a personality disorder. That's what he had.

[1079] And third, the age of the Defendant, Michael Marnell Smith. Well, I would submit to you that age thirty years old doesn't mitigate the killing and murder of another human being.

I would submit to you there has been absolutely no mitigation in comparison to the crimes that this man has perpetrated against human beings and society at large. And I don't ask you to give the death penalty without submitting that the evidence bears the death penalty out. That there is no doubt that this man is the man who committed these crimes, absolutely no doubt. And I would submit to you that we should guarantee, guarantee that Michael Marnell Smith will never ever hurt or injure anybody else in our society. It's just not worth taking the chance on him.

[1080] Thank you.

COURT: Mr. Wood.

MR. WOOD: Ladies and gentlemen, your task today is one of the most serious that I think anyone can be confronted with. And my heart, and I'm sure yours, goes out to everyone in this situation.

I'm not standing here and telling you that—that Michael Smith's conduct was proper or that it should go unpunished. My heart goes out to everyone that has been involved in this situation. Mr. Smith's family, Audrey Weiler's family, as I'm sure yours does.

But Mr. Person is saying to you because Michael Smith took a life, which was wrong, you should order that his be taken. That Michael Smith should be taken from here and taken to the Penitentiary on Spring Street in Richmond, and there await your sentence of death. [1081] That he should be taken and placed in an electric chair and someone pull a lever and send thousands of volts through his body. He's saying because Michael Smith killed Audrey Weiler, that's what we should do. That's what society should do with him. Audrey Weiler was a living human being, and so is Michael Smith. Mr. Person wants a guarantee, so in order to get that guarantee he wants you to burn Michael Smith.

But you know there are no guarantees in life. There are no guarantees that anyone in this room won't commit a crime some day. So how—how do we, society, guarantee that? If Mr. Person wanted a guarantee when he sent him to the Penitentiary, in 1973, why didn't they do something to help the man then? Why did not they give him the opportunity to [1082] be helped?

He spent a month and a half up at Eastern State, I'm sorry, Central State Hospital, where he was undergoing diagnostic care. He was cooperative, no problems whatsoever with him, and that's what it takes for someone to be helped under treatment. Doctor Dimitris testified to. So why didn't they offer him that care in Richmond? Why is it that a psychologist interviewed him and said he had a problem and then send him back to the cell? Why didn't they give him that help now. Then. We

probably wouldn't be here today if they had. But now you are faced with this awesome, most awesome decision.

Well, this problem that Michael Smith has is not something that he could have helped. Mr. Person asked us well, who do we blame. He said, "I blame it on [1083] him." At three years of age, at three years of age, Mr. Person—Mr. Person would have expected Michael Smith to say, "No, I don't want this illness. Take it away. Take it away. I don't want it." What caused the illness? I don't know.

You know what his family is like, and I have nothing whatsoever against religion or christianity or any faith anyone wants to believe. But he was brought up in one of the strictest environments possible. You've heard what the teachings of their church is, and I'm not saying that the teachings are wrong. It's a very good teaching, but I can see what has happened to Michael Smith. Subjected to this constantly, subjected to the teachings of the faith constantly, coupling that with the fact that he was brought up on a farm, never had an outside job except a bus driving job when [1084] he was fifteen years old, and went to Vietnam to fight for us. Those are the only two jobs he ever had outside of the farm. And I'm not saying being raised on a farm is bad. I wish I would have had the opportunity, but think of all these pressures, that coupled with the fact that he was the oldest child. But when he was three or four or five years old, Mr. Person thinks that—Michael Smith should have said, "No, I don't want this—illness. Take it away."

He said in his statement that—that "I don't know what makes me do this. I don't know what makes me do this. I need help." Mr. Dunford said he needed help; he would try to get him help through the Commonwealth Attorney. Why didn't somebody give him help in 1973? I'm asking you to give Michael Smith that opportunity, to give Michael Smith the opportunity to have some [1085] treatment for this illness. We don't take someone out that has pneumonia or cancer and take him up to Spring Street in Richmond and strap him in a chair and throw

thousands of volts to them. We treat them. True, they have not committed a crime. But their illness did not cause them to commit a crime either.

I agree with Mr. Person that it is not normal behavior to commit murder. I agree with him wholeheartedly. And Doctor Dimitris says he is not—does not behave normally, but he goes further than that and says Michael Smith has a mental disturbance, mental disorder. And you've heard of what treatment he's had in the past.

Joyce asked Mr. Smith what did the church do when Michael got out of prison. "Well, we patted on the back, and we—we accepted him back in the fold." That's the [1086] treatment that Michael Smith has been offered since 1973, when this first rape occurred. Doctor Dimitris says that Michael Smith can be helped if he's cooperative, and you heard how cooperative he's been throughout this matter.

He can be helped, and all we ask you ladies and gentlemen is that you conserve human life, as I believe it is proper. That you conserve his life and allow him the opportunity to be treated for his illness, just as if a person with pneumonia can be treated for theirs. I leave—his life in your hands and in your minds, in your contemplations and your deliberations today. And I ask that you spare his life, as I ask that all life be spared.

MR. PERSON: I would submit to you that it's nobody's fault but Michael Marnell Smith. Mr. [1087] Wood says, "Look how cooperative he has been." Have you seen any cooperation? Have you? If you call two rapes and one violent murder cooperation, it's unbelievable. He talks about his life. Who had a better life than he's had. He said he couldn't help himself. You read the statement again when you get in there. Read it. Couldn't help himself. He said he intentionally murdered with his hands and knife and drowning, intentionally did it, so he wouldn't go back to the Penitentiary. Couldn't help himself. He made that choice. He weighed the odds and made that choice. Couldn't help himself. I don't know what—Mr. Wood said, "I

don't know what makes me do it. I don't know what makes me kill and murder, so I don't have to go back to the Penitentiary."

[1088] He came out of the Penitentiary, back three months. His family accepted him back in. His father said they trained him, he accepted it. And with that time, as Doctor Dimitris put it, he went down to that beach for one purpose, and he accomplished that purpose.

There's no mitigation. Absolutely none. When does it stop? When does somebody deserve to die for the crime that they have committed?

I would say to you all in all sincerity, and it is painful, it is painful, and it is difficult, but you all did take an oath and did say that you would abide by the law, and did say that you would fix death in a proper case. And this is a proper case, I would submit to you. I just don't think and would submit to you that we can't make a mistake about it. [1089] This cannot happen again. We, all of us, have to insure that. And you're the conscience of the community. And it's in your ball park, and I'm sure it's painful and difficult, but we all reach a stage in life that we have to make these large decisions and live with them. You're going to have to live with it.

Somebody said it better than I did. Let us have faith that a government of the people, by the people, and for the people would demand that an extreme situation, such as this, that there is only one proper penalty, the supreme penalty. And in that faith, let us to that end dare to do our duty as we understand it, for you have sworn a true verdict to render according to the law and the evidence, so help you God.

Regardless of how difficult your duty becomes, it is mere child's [1090] play to what Audrey Weiler was forced to endure, and we can't forget that. We can't forget that first rape case. We just can't forget those things, sitting in this Courtroom. To infer by your verdict that the life sentence under the law of our State, that that would be a proper punishment in return for

what this man has done to these people, to society, would just be a charade.

And I say that to you and know when you go back in the jury room, remember that you didn't cause this to happen. You did not cause this to happen. This man has already determined that capital punishment exists in this country.

Thank you.

COURT: Ladies and gentlemen of the jury, you shall retire and retain the same foreman or elect a new one, as you see fit, to preside over your deliberation.

[1091] I have written two possible verdicts. And they are only two. This is the penalty of death or life imprisonment.

In order that you give the death penalty, you must find that, that Instruction Number One, that the conduct—there is a probability, based upon the prior history of the Defendant, that he would commit criminal acts of violence and would constitute a continuing serious threat to society. If you find that in this case, beyond a reasonable doubt, then you may impose the death penalty. Or if you find that in this particular case the actions of the Defendant were so that—outrageously or wantonly vile, horrible, inhuman, in that it involved, one, torture, two, depravity of mind, or aggravated battery of the victim, if you find [1092] one of those three things existed as a result of this crime, you may impose the death penalty.

I have written this verdict, and I'll read it to you. "We, the jury, on the issue joined, having found the Defendant guilty of willful, deliberate and premediated kiling of a person during the commission of or subsequent to rape, and that," and this is in parentheses, "(after consideration of his past criminal record, that there is a probability that he would commit a criminal act—would commit criminal acts of violence that would constitute a continuing serious threat to society)," end of parentheses, "or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman, in that it involved," and again in parentheses, "(torture),' closed paren-

theses, parentheses again, "(depravity of [1093] the mind)" closed parentheses, parentheses, "(aggravated battery of the victim)," closed parentheses), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death."

If you ladies and gentlemen decide on the death penalty, I will ask you on this verdict to strike out those—one of those four items that you do not consider appropriate. In other words, leave in the one on which you base your verdict, should you find the death penalty. Or if you find two reasons for it, you may leave those in. But otherwise just scratch out with a pencil those things you do not find. Do I make myself clear?

Now, the second verdict is, "We, the jury, on the issue joined, having found the Defendant guilty of willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape, and having considered all of the evidence and the aggravation and mitigation of such offense, fix his punishment at imprisonment for life."

One of those two verdicts, ladies and gentlemen, should be rendered by you. Are there any questions before you retire? If not, you can retire and deliberate as to what the penalty in this case should be.

* * * *

[1102] CLERK: "We, the jury, on the issue joined, having found the Defendant guilty of willful, deliberate and premeditated killing of a person during the commission of, or subsequent to rape, and that (after consideration of his past criminal record, that there is a probabilty that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman, in that it involved (torture) (aggravated [1103] battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death. Signed Adolphus G. Bradshaw, Foreman."

* * * *

CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG & COUNTY OF JAMES CITY

INSTRUCTION NO. 1

The Court instructs the jury that the penalty of death shall not be imposed unless you find that the Commonwealth has proven beyond a reasonable doubt that:

1. There is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he has been found guilty that he would commit criminal acts of violence that would constitute a continuing serious threat to society,

or

2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim;

You may fix his punishment at death.

If you find that the Commonwealth has failed to prove either (1) or (2) above beyond a reasonable doubt, or if you find that other mitigating circumstances do not justify a sentence of death, you may fix the defendant's punishment at life imprisonment.

CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG & COUNTY OF JAMES CITY

INSTRUCTION NO. A TO THE JURY

The Court instructs the jury that when determining the punishment to be imposed for a conviction of capital murder, you shall consider the circumstances surrounding the offense, his history and back ground of defendant Michael Marnell Smith, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to the following (i) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or (ii) at the time of the commission of the capital felony, the capacity of defendant Michael Marnell Smith to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (iii) the age of defendant Michael Marnell Smith at the time of the commission of the capital offense.

August 15, 1977

James C. Dimitris, M.D.
Post Office Box 4030
Petersburg, Virginia 23803

Re: Michael Marnell Smith Reg. No. 83258

Dear Dr. Dimitris:

As I have previously advised you, I represent Michael Marnell Smith with respect to certain charges now pending against him the the Circuit Court for the City of Williamsburg and County of James City.

This letter will confirm our telephone conversation wherein you informed me that you would confer again with Mr. Smith prior to his return to this area. I have advised W. L. Person, Jr. the Commonwealth's Attorney, that I would request from you copies of the evaluation reports conducted on Mr. Smith, including, but not limited to, psychiatric, psychological and sociological reports. Mr. Person has indicated that he would have no objections to your providing me with this information. I would, therefore, request that you forward these items to me at your earliest convenience and I am forwarding a copy of this letter to Mr. Person for his filed and information.

I have also advised Mr. Person of the fact that you could not be available on the date that this case is presently scheduled for trial.

Your cooperation and assistance in this matter are appreciated.

Very truly yours,

David F. Pugh

DFP/ak

cc: Mr. W. L. Person, Jr.
Commonwealth's Attorney

PILE, COX, ROEBUCK & SOLOMON
530 E. Queen Street
Hampton, Virginia 23669

October 1, 1977

The Honorable Russell M. Carneal
Judge in the Circuit Court for the
City of Williamsburg and James City County
Williamsburg, Virginia 23185

Re: SMITH, Michael Marnell

Dear Sir:

This person was brought by the Williamsburg sheriff to the undersigned's office October 1, 1977, handcuffed. He seemed cooperative in the interview. He mentioned he was 31 years of age, born February 25, 1946. He was questioned closely about his reason for being in jail, and he stated that on May 23, 1977, he was involved in raping and killing a woman on the beach off Colonial Parkway. He described the episode as visiting this woman, talking to her for about 5 minutes, he told her to come with him, he propelled her down the beach about 1 mile, told her to take her clothes off, which she did, had sex with her in the vagina, had an orgasm, then he choked her and threw her in the water. He said that he was afraid that she would tell on him. He states that he had been in jail before for rape in 1973 till January 25, 1977. The client was asked if he had ever raped anybody before that episode, and he said that his lawyer told him not to talk about that. He states he has never killed anyone before. He has worked on the dairy farm for the Gospel Spread Church all his life. His father manages the farm, and apparently many of the brothers and sisters of the patient work there as well. There are 7 brothers and 4 sisters.

Patient is married and there are 3 children. He denies any sexual problems with his wife, states that he has sex with his wife if he can once or twice a day, but sometimes it may go a little longer than that. He has never been under psychiatric treatment except that he was examined at Central State as a

result of this charge. Patient relates that he went into the Service in 1965 and stayed until 1969. He was in Viet Nam where he served as a cook and was not involved in any killing of Viet Namese while he was there as a part of his duties. He denies being involved with either drugs or alcohol. In discussing more of the patient's problem, it was noted that he has never raped anyone who was Black. He said he came close to it one time with a girl who was riding the school bus which he was driving, but after he tore her clothes off he thought better of it and did not do so. He stated that otherwise he had had no feelings of wanting to rape until he got out of the Service. He admits that he has this compulsion to rape and thinks about it a good deal and with many people he sees. He hopes now that the Holy Ghost will restrain him. When asked about this particular problem, he says "every man has a weakness." He then goes on to relate that some people drink, some people smoke, and some people have other problems. Patient relates that he is a high school graduate. He speaks without a whole lot of feeling, but he does say that he did feel bad that he killed this woman, that he cried about it. He doesn't show a great deal of emotion at this particular time. Since the 2 cases of rape he talked about involved White women, he was asked if he had the same feeling toward Black women and he states that he probably does, but that since there are more White women that live around his area, he would have more opportunity to rape White women. He denied any White hostility and says some of his best friends are White.

MENTAL STATUS indicates a man who is rather thin, who is well oriented to time, place, and person, and has a clear sensorium. There are no delusions or hallucinations. He does not hear God's voice. He feels that God directs him to read the Scriptures sometimes, but he doesn't hear a voice. His affect is rather bland and there is not a great deal of show of any type of emotion and no evidence of depression is noted. Memory appears intact to both recent and remote events. Insight is not present and and judgment is poor. In talking further over his sexual history, it is noted he stated his first sexual act was at

the age of 22 in Viet Nam when he paid a prostitute $5. He never had any willing sex with anyone until he was married to his wife in 1969.

IMPRESSION: Sociopathic Personality; Sexual Deviation (rape)

Patient is competent to stand trial.

Very truly yours,

/s/WENDELL J. PILE, M.D.

vm
xc: W. L. Person, Jr.
Commonwealth's Attorney
321-45 Court Street, West
Williamsburg, VA 23185

David F. Pugh
STONE, BLAND AND WOOD
Drawer H B
Williamsburg, VA 23185

STONE, BLAND AND WOOD
Attorneys at Law
Williamsburg, Virginia 23185

October 15, 1977

Wendell J. Pile, M.D.
530 E. Queen Street
Hampton, Virginia 23669

RE: SMITH, MICHAEL MARNELL

Dear Dr. Pile:

I am in receipt of your report on the examination of my client, Michael Marnell Smith. The Court Order entered September 28, 1977 which appointed you as the examining physician requested your opinion of the mental condition of the defendant at the time of the alleged offense. After reviewing your report, it appears that the above medical opinion was not rendered. I request that you might inform me of this opinion as soon as possible. Enclosed you will find a statement allegedly given by Mr. Smith concerning the crimes he is charged with. It may be of some benefit to you in assisting you in your opinion.

Also, request you might advise me as to the medical definition of one having a "sociopathic personality; sexual deviation," as well as any possible treatment for such condition.

Very truly yours,
STONE, BLAND AND WOOD

/s/David F. Pugh

PILE, COX, ROEBUCK & SOLOMON
530 E. Queen Street
Hampton, Virginia 23669

October 26, 1977

David G. Pugh
STONE, BLAND AND WOOD
P.O. Box HB
Williamsburg, VA 23185

Re: SMITH, Michael Marnell

Dear Mr. Pugh:

Based solely on the information that you included in your letter of 10-15-77, I would say that this man was fully responsible for his actions. It seems obvious that he knew precisely what he was doing and that he knew it was wrong. I do not see from this information anything that suggests he was suffering from any sort of mental disease which would have rendered him not responsible at that time. I would like to add that I also do not see any evidence of any sort of uncontrollable impulse.

I am enclosing a copy of the definition of any antisocial personality which is taken from the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association"

301.7 Antisocial personality

> This term is reserved for individuals who are basically unsocialized and whose behavior pattern brings them repeatedly into conflict with society. They are incapable of significant loyalty to individuals, groups, or social values. They are grossly selfish, callous, irresponsible, impulsive, and unable to feel guilt or to learn from experience and punishment. Frustration tolerance is low. They tend to blame others or offer plausible rationalizations for their behavior. A mere history of repeated legal or social offenses is not sufficient to justify this diagnosis.

As to treatment of this personality type it is my impression that most psychiatrists would say that there is no effective

therapy and that this being so, the callous or aggressive types of these personalities should be at least permanently locked up where they can no longer prey upon people. At least this is my opinion.

Very truly yours,

HOWARD L. COX, M.D.

IN THE SUPREME COURT OF VIRGINIA

Record No. 780293

MICHAEL MARNELL SMITH,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

BRIEF AMICUS CURIAE ON APPEAL OF THE POST-CONVICTION ASSISTANCE PROJECT OF THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW

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* * * *

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* * * *

SUPREME COURT OF VIRGINIA—RICHMOND
(219 Va. 455)

MICHAEL MARNELL SMITH

v.

COMMONWEALTH OF VIRGINIA
October 6, 1978

OPINION

POFF, J., delivered the opinion of the Court.

On November 2, 1977, Michael Marnell Smith was convicted by a jury of capital murder following rape. Code §§ 18.2-10(a) and 31 (e) (Cum. Supp. 1977). The next day, pursuant to the bifurcated trial proceedings prescribed by Code §§ 19.2-264.2, -264.4, -264.5 (Cum. Supp. 1977), the jury heard evidence on the question of penalty and recommended a sentence of death. A post-sentence report was filed and, following another hearing, the trial court affirmed the jury's recommendation and entered final judgment November 30, 1977. Defendant's appeal and automatic review of sentence were consolidated and accorded priority on the docket. Code §§ 17-110.1, -110.2 (Cum. Supp. 1977). By leave of court, the Post-Conviction Assistance Project of the University of Virginia filed a brief *amicus curiae* is support of defendant's position.[1] This is the first capital case appealed under the current statutes.

The medical evidence showed that Mrs. Audrey Jean Weiler, whose body was found floating in the James River at a point near the Colonial Parkway within James City County, died on

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[1] We will consider the arguments advanced by *amicus* in support of the errors assigned by defendant. Some of the issues raised by those arguments, however, were never raised in the court below, are not comprehended by the assignments of error, and are not addressed by defendant on appeal. Such issues will not be noticed by this Court. Rule 5:21.

May 23, 1977 as the result of asphyxia drowning and multiple stab wounds.

Defendant signed a written statement admitting that he encountered decedent walking alone on the beach, displayed a knife, ordered her to disrobe, and engaged in sexual intercourse with her; that, fearing she "could send [him] back [to the penitentiary]", he "started choking her with both hands . . . until she went limp"; and that he then "dragged her out into the water a couple of feet", "held her head under the water . . . [until] she stopped moving", and "stabbed her in the back several times."

On brief, defendant poses multiple questions which we will address in five categories. The first category relates to pre-trial proceedings; the second to the guilt trial; the third to constitutional challenges to the statutory complex under which defendant was convicted and sentenced; the fourth to the penalty trial; and the fifth to the propriety of the penalty imposed.

I. PRE-TRIAL PROCEEDINGS

A. Jurisdiction

Defendant assigns error to the trial court's denial of his pre-trial motion to dismiss for lack of justification. Tacitly acknowledging that the crime was committed within the geographical boundaries of James City County, defendant argues that, since the land in question is owned by the United States, it was incumbent upon the Commonwealth to show that the United States did not have exclusive jurisdiction over crimes committed thereon. It is well settled, however, that the mere ownership of land by the United States does not divest a state of its jurisdiction over that land, and that the nature and extent of the federal jurisdiction is dependent upon the consent of the state. *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937); *accord*, *Waltrip* v. *Commonwealth*, 189 Va. 365, 53 S.E.2d 14 (1949). The United States was ceded *concurrent* jurisdiction by statute over crimes committed on land to which it holds title

within the Commonwealth. Code § 7.1-21(1) (Repl. Vol. 1973).[2] Any additional jurisdiction over this land can be relinquished only if the Commonwealth executes a deed of cession, and the deed must be formally accepted by the United States. Code § 7.1-21 (Cum. Supp. 1978); 40 U.S.C.A. § 255 (1970). In light of the cession by statute, it is presumed that the Commonwealth retains concurrent jurisdiction over the area embracing the locus of the crime. To hold otherwise, would be to require the Commonwealth to prove the negative, *i.e.*, that the United States was not deeded and did not accept exclusive jurisdiction. Since defendant adduced no evidence to show the affirmative, the presumption prevails and the trial court's ruling on the motion to dismiss was proper.

B. Change of Venue

In support of his motion for a change of venue, defendant introduced numerous newspaper clippings, transcripts of radio broadcasts, and affidavits to show that the news media had given extensive publicity to the details of the crime with which he was charged, to his earlier conviction rape, and to the "outbreak of rapes in the Williamsburg-college community." Conceding that a change of venue is within the sound discretion of the trial court, *Lewis* v. *Commonwealth*, 218 Va. 31, 34, 235 S.E.2d 320, 322 (1977), defendant contends that the publicity prejudiced his right to a fair trial and that the trial court abused its discretion.

Defendant does not dispute the factual accuracy of the publicity. Nor does he point to anything of record to indicate that a single juror seated at trial was unable to disregard the publicity and accord him a fair trial. The burden of defendant's complaint is that the sheer volume of publicity concerning so heinous a crime, commited by a prior offender against a member of a

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[2] This paragraph of the statute was repealed by Acts 1976, c. 211, but, by the same enactment, a similar provision was incorporated in Code § 7.1-18.1 (Cum. Supp. 1978).

family prominent in the community, compels a finding of unfairness. We disagree.

> Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular the *voir dire* examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected. But . . . extensive knowledge in the community of either the crimes or the puntative criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do . . .

Dobbert v. *Florida*, 432 U.S. 282, 303 (1977); *see also Greenfield* v. *Commonwealth*, 214 Va. 710, 716-17, 204 S.E.2d 414, 419-20 (1974).

We hold that defendant has failed to show that he could not or did not receive a fair trial in the jurisdiction in which he was convicted, and we find no abuse of judicial discretion in the trial court's ruling.

C. Exclusion of Juror

The trial court excluded Mrs. Piggott as a juror for cause related to her predispostion against capital punishment. Relevant portions of the *voir dire* are assembled at the foot of this opinion as Appendix B.

Veniremen may not constitutionally be excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction", *Witherspoon* v. *Illinois*, 391 U.S. 510, 522 (1968), and exclusion of a single veniremen for such cause renders the death penalty constitutionally infirm, *Davis* v. *Georgia*, 429 U.S. 122, 123 (1976).

In support of his assignment of error to the trial court's ruling, defendant relies principally upon portions of two footnotes in *Witherspoon:*

> Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.

391 U.S. at 516, n.9.

> The most that can be demanded of a venireman . . . is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. . . .
>
> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial . . .

391 U.S. at 522, n.21.

The courts which have addressed the question do not agree what effect these two footnotes have upon the textual holding that "general objections" to capital punishment are not sufficient grounds to exclude a venireman for cause. *See* 39 ALR 3d 550 (1971). In our view, footnote 9 means that, absent an unambiguous statement of *absolute* objection, the trial judge cannot *assume* absolute objection. It does not mean that, simply because there may be some confusion and inconsistency; in the statements that were made, the trial judge is foreclosed from determining from the *voir dire* at large whether a juror would "*automatically* vote against the imposition of capital punishment".

> [E]ven though a prospective juror's *voir dire* answers to questions concerning his beliefs as to capital punishment may be equivocal and not models of clarity, it is proper for

> the trial judge to excuse the juror for cause when a contextual consideration of the entire *voir dire* examination indicates that the juror could not vote for a verdict which would result in the imposition of the death penalty.

State v. *Simmons*, 286 N.C. 681, 688-89, 213 S.E.2d 280, 286 (1975), *vacated on other grounds*, 428 U.S. 903 (1976).

While footnote 9 is merely a comment parenthetical to the *Witherspoon* Court's recitation of the proceedings in the trial court, footnote 21 is keyed to and is a corollary of the textual holding. Under the holding and corollary read together, "general objections" to capital punishment are not constitutionally sufficient to justify the exclusion of a juror for cause; nothing less than an absolute objection, *i.e.*, an irrevocable commitment to vote against the death penalty, will suffice.

Whether an exclusion is justified under the *Witherspoon* test is a mixed question of law and fact. Stated differently, the question whether the venireman should be excluded turns upon the question whether, in fact, he is "irrevocably committed". In order to apply the rule of law, the trial court must first decide the factual question. As fact-finder, the trial court must weigh the meaning of the answers given in light of the phrasing of the questions posed, the inflections, tone, and tenor of the dialogue, and the general demeanor of the prospective juror. We are aware that, while the words employed may, when transcribed and read in retrospect, appear ambivalent, the judge who heard them uttered was uniquely positioned to assess their ultimate import. Accordingly, his finding on this question of fact will not be disturbed on appeal unless, upon consideration of the *voir dire* as a whole, we can say that the venireman's commitment against the death penalty was not "unmistakably clear".

The record of the *voir dire* shows that, in response to several questions patently phrased to elicit such a response, Mrs. Piggott agreed that capital punishment might "possibly" be appropriate in some cases. At least six times, however, she stated positively, and with no ambiguity, equivocation, or res-

ervation whatsoever, that she could never, under any circumstances, vote to impose the death penalty. In reply to the last two questions put to her, she acknowledged that, if defendant should be convicted, she would vote for a "lifetime" penalty and that she was "absolutely against the death penalty".

In argument following the *voire dire*, counsel agreed that the test for exclusion was, not whether Mrs. Piggot was "against the death penalty", but rather whether she was "absolutely against the death penalty". Noting the inconsistency in some of the responses to questions phrased by respective counsel, the trial court concluded that "life is all she'd ever give" and discharged her from the jury panel. We cannot say that this finding of fact was not "unmistakably clear", and we hold that the ruling grounded upon that finding did not contravene the principles announced in *Witherspoon* and its progeny.

II. THE GUILT TRIAL

A. Reputation Evidence

[4] Rape was an essential element of the crime of capital murder charged in the indictment. Code § 18.2-31(e). "[W]here consent is advanced as a defense to a charge of rape, the previous unchaste character of the prosecutrix may be shown by proof of general reputation." *Wynne* v. *Commonwealth*, 216 Va. 355, 356, 218 S.E.2d 445, 446 (1975). The trial court refused to permit such evidence on the ground that the defense of consent had not been advanced.

As defendant says, once the defense is advanced, the issue of consent *vel non* becomes a jury question. But whether evidence relevant thereto is admissible is an evidentiary question. That issue depends upon whether the defense of consent has been advanced.

We do not agree that the defense is advanced solely by a plea of not guilty. That plea could be grounded upon defendant's belief that the Commonwelath is unable to prove identification, opportunity, or the physical elements of carnal knowledge. The

defense of consent can be "advanced" within the meaning of the rule in *Wynne* only by evidence adduced by one of the parties. Whether the evidence is sufficient for that purpose necessarily is a question of law.

Here, the only evidence relevant to that question was defendant's own account of how the crime was committed. On appeal, defendant emphasizes certain circumstances as described in his confession: he met the decedent on a deserted beach; she joined him in friendly conversation; she permitted him to remove briars from her bare feet; she walked with him to a wooded area; she removed her own clothes and a tampon; and she made no attempt to escape while he affixed a contraceptive device. In light of the absence of evidence of a struggle or "defensive wounds", defendant says, this evidence was sufficient to advance the defense of consent.

In making its determination on this question, the trial court was not confined to isolated excerpts of the confession. According to other portions of the confession, when the decedent "started to walk toward her car and said 'I'm going'", defendant put his "right arm around her waist" and told her, "come on, go with me"; she "was not too willing at first so [he] pulled on her" and, when she asked him several times "where are we going", he told her to "just keep on walking"; when they reached the wooded area, he "pulled a knife" and "told her to take her clothes off"; she then said, "please don't do this, I've got two kids at home, you don't need me"; and telling her, "I've got to have you", defendant "got on top of her and had sexual relations with her".

The absence of evidence of a struggle or defensive wounds was largely irrelevant to the question before the trial court, for a "woman is not required to resist to the utmost of her physical strength if she reasonably believes that resistance would be useless and result in serious bodily injury to her." *Barnett* v. *Commonwealth*, 216 Va. 200, 202, 217 S.E.2d 828, 830 (1975). Nowhere in his confession did defendant claim that the act of intercourse was consensual. Rather, he acknowledged that he

applied force in taking her to the wooded area, that he threatened her with a knife, and that she protested his advances. We believe the only reasonably conclusion the evidence supports is that she submitted, not out of volition, but out of a state of fear, one which, given the brutal consequences which followed, was fully justified.

We hold, therefore, that the trial court correctly ruled as a matter of law that the defense of consent had not been advanced and that the evidence defendant proffered was inadmissible.

B. Instruction on Rape

As tendered, defendant's Instruction "H" defining forcible rape required the Commonwealth to prove that the act of intercourse was accomplished "by force and violence". Code § 18.2-61 does not require the Commonwealth to prove violence. Before granting the instruction, the trial court amended the language to require proof that intercourse with the decedent was accomplished "against her will, by force". The amendment accords precisely with the statutory definition, and we find no error in the trial court's action.

C. Photographs

Defendant charges that, since photographs of the victim's body "were not necessary to identify the victim", they were merely inflammatory and, hence, inadmissible.

The admissibility of photographs is a matter within the sound discretion of the trial court. *Inge* v. *Commonwealth*, 217 Va. 360, 364, 228 S.E.2d 563, 566 (1976). There is no abuse of discretion in admitting photographs which are "relevant and material to establish premeditation and malice and to show the degree of atrociousness of the crime." *Brown* v. *Commonwealth*, 212 Va. 515, 519, 184 S.E.2d 786, 789 (1971).

We are of the opinion that the photographs depicting contusions about the victim's neck, abrasions on her back, and multiple stab wounds in her body were relevant and material

for the purposes approved in *Brown* and that they were no more inflammatory than the medical testimony detailing the results of the autopsy.

D. Testimony of Victim's Daughter

The crime occurred at "approximately 1:45 or 2:00 p.m." on May 23, 1977. Heather Weiler, the victim's young daughter, testified that she last saw her mother at 8:00 a.m. that morning. One witness saw Mrs. Weiler alive at 10:30 a.m. and another at noon. Other witnesses described events late that afternoon leading to the discovery of the victim's body and other physical evidence.

Conceding that "the admissibility of evidence is within the sound discretion of the trial court", defendant contends that, since Heather "had no personal knowledge of the offense", her testimony "served only to inflame the jury" and its admission constituted an abuse of discretion.

As we read Heather's testimony, it did nothing more than supplement the testimonial narrative of the sequence of events preceding and following the commission of the crime. Such background events, though not directly relevant to the question of guilt, are material to the fact-finder's understanding of the crucial event, and for that purpose courts allow considerable leeway in the testimonial narrative. *See* McCormick, *Evidence*, (2d ed. 1972) § 185, p. 434.

We are of opinion that Heather's testimony was not, in the due process connotation of the word, inflammatory. None of her language was inflammatory *per se*. Given the fact the jury was already aware that the decedent was the mother of two young children, it is unlikely that Heather's appearance in the courtroom was inflammatory. The record does not disclose, and defendant does not argue, that Heather's conduct or demeanor during her brief testimony was maudlin, vengeful, or otherwise emotional. Hence, giving due deference to the trial court's superior perspective of the witness and the impact of her

testimony on the jury, we cannot say that the trial court committed reversible error in allowing her testimony.

E. Competency Of Confession

(1) Miranda

Defendant and his brother Howard lived on a farm near the scene of the crime. Officer Dunford, who was aware of defendant's prior conviction of rape, and Officers Gunson and Cumbee went to the farm and asked Howard if they could talk with defendant. Defendant was not there but, in response to Howard's telephone call, arrived a short time later. Standing in a hallway just inside the front door of the Smith home, the officers questioned defendant as he sat on the short staircase leading to the kitchen. They told him they were investigating the Weiler murder and asked him if he "had done this thing". Without any foundation in fact, Dunford suggested that defendant's fingerprints and footprints had been found at the scene of the crime. Later, while Dunford was in the kitchen talking with Howard, Gunson told defendant he believed he was guilty and urged him to confess and ease his conscience. The officers testified that, during the course of the interrogation, which lasted for possibly 15 minutes, defendant made no inculpatory statements. "He sat on the step with his head bowed, looking at the floor and twirling the front of his hair with his forefingers", and, according to the officers, his only responses were, "I know you would have come to see me" and "Do you think a lawyer could help me?" At that point, Gunson held up his hand and told defendant not to say anything more. Cumbee read the *Miranda* warnings twice, asked whether defendant understood them, and defendant acknowledged that he did. Defendant then made an oral confession, showed the officers the scene of the crime, and pointed out the place he had discarded the murder knife. Later at the jail, defendant signed the written confession introduced in evidence.

Testifying solely in support of his motion to suppress, defendant said that, during the course of the initial interrogation, he

had told the police, "I'm the one." This statement, he insisted, was made only after the investigation had "focused" upon him and had become "accusatory" and before the *Miranda* warnings were given. Therefore, he contends, he was under "custodial interrogation", his inculpatory statement was inadmissible under *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and his subsequent confession and all of the evidence derived therefrom was "tainted" under the rule in *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

Miranda applies only where there is "custodial interrogation", *i.e.*, "questioning initiated by law-enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" 384 U.S. at 444. The fact that the investigation had focused upon the suspect and had become accusatory is not determinative of the question of custody. *Jordan* v. *Commonwealth*, 216 Va. 768, 772, 222 S.E.2d 573, 577, at n.1 (1976); *cf.Beckwith* v. *United States*, 425 U.S. 341, 344-48 (1976). At the time defendant says he made the first incriminating statement, he had not been "deprived of his freedom in any significant way". He was not under arrest; no physical restraint of any kind had been imposed; and he was situated in a familiar, noncoercive enviroment which he had entered of his own accord. The trial court was not bound to believe defendant's testimony, but even if the inculpatory statement he said he made was made at the time he said, it was not the product of custodial interrogation, and we find no error in the trial court's ruling to that effect.

We see no merit in defendant's further argument that "his waiver was not voluntary because . . . statements made by the three police officers could reasonably have been interpreted as offers of psychiatric treatment." It is true that the police had discussed defendant's need for psychiatric help, but they testified unanimously and positively that no offers or promises were made, and nothing defendant said in the suppression hearing contradicted that testimony. Nor do we believe that the officers'

comments about the fingerprints and footprints overbore defendant's will and caused him to execute a waiver and make a confession he otherwise would have withheld. We conclude that defendant's waiver was voluntary and that the trial court did not err in admitting his confession.

(2) **Admission of Prior Crime**

Defendant's confession included the following exchange:

Q. Why did you kill her?

A. All I could think about was going back to the penitentiary. I was afraid she could send me back.

Evidence of defendant's prior criminal record adduced at the penalty trial was fully admissible. Code § 19.2-264.4B, C (Cum. Supp. 1977). Defendant contends, however, that the trial court should have excluded this portion of his confession at the *guilt* trial.

Generally, evidence of prior crimes is incompetent because it "confuses the issue before the jury, unfairly surprises the accused with a charge he is not prepared to meet, and tends to prejudice him in the minds of the jury". *Fleenor* v. *Commonwealth*, 200 Va. 270, 275, 105 S.E.2d 160, 163 (1958).

> There are exceptions, however, to this rule, as well established as the rule itself, and such evidence may be admitted to show motive, intent or guilty knowledge, or when it is connected with or leads up to the offense for which the accused is on trial.

Roy v. *Commonwealth*, 191 Va. 722, 726, 62 S.E.2d 902, 903 (1951).

Defendant freely admitted that his reason for killing the woman he had raped was to silence his accuser in order to avoid the consequences of his crime. We hold that his admission was fully competent to show motive, intent, and premeditation.

III. CONSTITUTIONAL CHALLENGES TO THE STATUTORY COMPLEX

A. Preface

The pertinent portions of the statutory complex under which defendant was convicted and this review was docketed appear at the foot of this opinion as Appendix A. A premeditated killing following rape is one of the crimes denominated "capital murder", a class 1 felony punishable by death or imprisonment for life. When an indictment for a class 1 felony is tried by a jury, four separate proceedings must be conducted before a sentence of death can be executed. Three evidentiary hearings must be conducted. In the first, the jury must determine the issue of guilt or innocence and may convict the defendant of the crime charged or innocence and may convict the defendant of the crime charged or a lesser-included offense. If the defendant is convicted of a class 1 felony, there must be a second trial by the same jury to determine the issue whether the penalty should be death or imprisonment for life. Bearing upon that determination, the jury may hear evidence concerning circumstances surrounding the offense, the history and background of the accused, and facts in mitigation of the offense. For illustrative purposes and not by way of limitation, five mitigating circumstances are expressly listed.

The jury may not recommend the death penalty unless the Commonwealth establishes one of two factors in aggravation of the offense. The Commonwealth must prove beyond a reasonable doubt either that there is a "probability" that the defendant would "commit criminal acts of violence that would constitute a continuing serious threat to society", or that his conduct in committing the crime was "outrageously or wantonly vile, horrible or inhuman, in that involved torture, depravity of mind or an aggravated battery to the victim." Code § 9.2-264.2. It is clear from the statutory context that, even when the Commonwealth establishes either or both aggravating circumstances, the jury is at liberty, in considera-

tion of circumstances in mitigation, to recommend a sentence of imprisonment for life.

The penalty verdict must be in writing in one of two prescribed forms—one for a life sentence and the other for a death sentence. The latter contains a recitation of a finding of either "dangerousness" or "vileness" and a statement that the jury has considered evidence in mitigation of the offense. If the jury is unable to agree upon the penalty, the trial court is required to impose a sentence of imprisonment for life.

When the jury recommends the death penalty, the trial court must direct a probation officer to investigate the history of the defendant and other relevant facts and make a report to the trial court in accordance with the provisions of Code § 19.2-299. Under that statute, a copy of the report must be made available to the defendant at least five days before it is presented in open court and the defendant is guaranteed the right to cross-examine the investigating officer and the right "to present any additional facts bearing upon the matter which he may desire to present."

At the conclusion of this third hearing, if the trial court determines that the death penalty is not "appropriate and just", it may set aside the sentence of death and impose a life sentence.

If the trial court affirms the death sentence, the defendant is entitled to an appellate review of the sentence as a matter of right, and the review is accorded priority on our docket. In the course of this fourth proceeding, this Court is directed to make two determinations, *viz.*, whether the sentence was imposed under the influence of passion, prejudice, or other arbitrary factor, and whether, considering similar cases, the penalty is excessive or disproportionate. Having made these determinations, this Court may affirm the death penalty or commute it to life imprisonment.

To this statuory complex, defendant poses a two-fold challenge. First, he maintains that, as applied to his case, it offends

the *ex post facto* clauses of the federal and state constitutions, U.S. Const. art. 1, § 10, and Va. Const. art. 1, § 9. Second, he contends that the statutory scheme is facially unconstitutional under the Eighth and Fourteenth Amendments.

Initially, we will summarize relevant developments in statutory and case law following the watershed decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972). *Furman* held that a statutory system which permits unbridled discretion in the process of imposing the death penalty violates the Eighth and Fourteenth Amendments. Responding to *Furman* in 1975, the General Assembly enacted new statutes eliminating sentencing discretion by making the death penalty mandatory upon conviction of selected offenses. Acts 1975, cc. 14, 15; Code §§ 18.2-1, *et seq.* (Repl. Vol. 1975).

Thereafter, in 1976 the United States Supreme Court decided five cases attacking the constitutionality of death penalty statutes. In *Roberts* v. *Louisiana*, 428 U.S. 325 (1976) and *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), mandatory death sentences were declared to be a constitutionally impermissible response to *Furman*. In *Jurek* v. *Texas*, 428 U.S. 262 (1976), *Proffitt* v. *Florida*, 428 U.S. 242 (1976), and *Gregg* v. *Georgia*, 428 U.S. 153 (1976), the Court decided that *Furman* did not require that all sentencing discretion be eliminated if the statutory system provides adequate standards to guide the exercise of that discretion.

In 1977, following the pattern approved in *Jurek*, the General Assembly enacted the statutory complex *sub judice*.

B. As Applied Constitutionality

The crime at bar was committed May 23, 1977. The statutes under which defendant was convicted did not take effect until July 1, 1977. Defendant argues that *Roberts* and *Woodson* rendered the mandatory death provisions of Title 18.2 as enacted in 1975 (hereinafter, the 1975 law) "presumptively unconstitutional" and that, on the date of the crime of which he was convicted, the death penalty could not be imposed in

Virginia; that Title 18.2 as enacted in 1977 (hereinafter, the 1977 law) was not ameliorative because it increased the potential penalty; and that the application of the more onerous 1977 law to a crime committed before it became effective thus violated the *ex post facto* clauses.

Manifestly, the alternative penalty provisions of the 1977 law were less onerous than the mandatory penalty provision of the 1975 law, and we do not agree that the 1975 law was "presumptively unconstitutional" at the time this crime was committed. In *Lewis* v. *Commonwealth*, 218 Va. 31, 235 S.E.2d 320 (1977), the defendant argued that *Roberts* and *Woodson* had invalidated the provisions of Code § 53-291 which prescribed a mandatory death penalty for the killing by an inmate of an employee of a prison. Noting that we had upheld the constitutionality of that statute in *Washington* v. *Commonwealth*, 216 Va. 185, 217 S.E.2d 815 (1975), and *Jefferson* v. *Commonwealth*, 214 Va. 747, 204 S.E.2d 258 (1974), we held that, until we had formally adjudicated a constitutional challenge, the statute "stand[s], at least presumptively, valid and enforceable," *Lewis*, 218 Va. at 38, 235 S.E.2d at 324.

The United States Supreme Court reached a similar conclusion from a comparable predicate in *Dobbert* v. *Florida*, 432 U.S. 282 (1977). Dobbert's crimes antedated the June 22, 1972 decision in *Furman*. The month following that decision, the Florida Supreme Court held that *Furman* invalidated the State's death penalty statutes. *Donaldson* v. *Sack*, 265 So.2d 499 (Fla. 1972). Later that year, Florida enacted the new statutes under which Dobbert was convicted. Dobbert claimed that there was no "valid" death penalty "in effect" on the date of his crime and that the application of the new statutes to his case increased the penalty and violated the *ex post facto* clause. Rejecting that argument, the Court said:

> Whether or not the old statute would, in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum de-

> terrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder.

Dobbert, 432 U.S. at 297.

There can be no doubt about Virginia's historical view of the gravity of premeditated murder; the death penalty has been on our statute books since 1796. Given this ancient prologue and in light of the statute on the books on the date of the crime at bar which, as we have said, was presumptively valid and enforceable, we believe defendant had "fair warning" of the consequences of murder.

We conclude, therefore, that since the 1975 law was presumptively valid, the 1977 law was ameliorative. When the changes the subsequent law makes in the prior law are ameliorative, there is no *ex post facto* violation; the same is true when the changes, though not ameliorative, are merely procedural. *Dobbert*, 432 U.S. at 292, n.6. Clearly, the changes incorporated in the 1977 law were both ameliorative and procedural. Prompted by the teachings of *Jurek*, *Proffitt*, *Gregg*, *Roberts*, and *Woodson*, the General Assembly changed the 1975 law and established new procedures to be employed in the sentencing process to insure that the death penalty would not be imposed in an arbitrary or capricious manner. We hold, therefore, that the trial court committed no constitutional error in applying the 1977 law to defendant's case.

Aside from this constitutional challenge, defendant invokes the provisions of Code § 1-16 (Repl. Vol. 1973) which read in pertinent part:

> No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any . . . punishment incurred . . . or in any way whatever to affect any such offense or . . . punishment so incurred . . . save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. . . .

Citing *Ferguson* v. *Ferguson*, 169 Va. 77, 192 S.E. 774 (1937), defendant argues that, absent an expression of legislative intent to the contrary, all new statutes must be applied prospectively only. While it is true that the 1977 law is silent on the question, § 1-16 itself expressly provides that "proceedings" under a new statute "shall conform, so far as practicable, to the laws in force at the time of such proceedings." We construe this language to mean that procedural provisions of the statute in effect on the date of trial control the conduct of trial insofar as practicable. Defendant's trial was conducted in strict compliance with the new procedures in effect on the date of his trial, and we find no merit in his argument.[3]

C. Facial Constitutionality

Defendant maintains that the 1977 law is facially unconstitutional under the Eighth and Fourteenth Amendments. He argues that the death penalty *per se* constitutes cruel and unusual punishment. Observing that *Furman*, *Roberts*, and Woodson interpreted the Eighth and Fourteenth Amendments to prohibit statutory schemes which vest "unbridled discretion" in the sentencing authority, he also argues that the Virginia statutes vest such discretion in the Commonwealth's Attorney; he reasons that, absent statutory standards to guide the prosecutor in selecting which defendants will be prosecuted for a capital offense and which for a non-capital offense, the 1977 law is facially arbitrary and capricious.

Both of these arguments were considered and rejected by the plurality of the United States Supreme Court in *Jurek*, *Proffitt*, and *Gregg* and by this Court in *Washington* v. *Com-*

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[3] On brief, defendant also argues that, as applied to a male, Code § 18.2-61 (Repl. Vol. 1975), which defines rape (one of the elements of the instant crime) as carnal knowledge of a female against her will and by force, constitutes a denial of equal protection of the laws. This question was not raised below, it was not the subject of an assignment of error, and it was not argued at bar. It will not, therefore, be noticed here. Rule 5:21.

monwealth, *supra*, and *Jefferson* v. *Commonwealth*, *supra*. For the reasons stated there, we decline defendant's invitation to disregard these precedents.

We are not persuaded by the contention that the statutory definitions of the two aggravating circumstances (see Appendix A) are so vague as to vest the sentencing authority with standardless sentencing power.

The language defining the first aggravating circumstance, *i.e.*, the potential "dangerousness" of the defendant, is identical to that in the Texas statute upheld in *Jurek*. Rejecting a vagueness challenge to that language, the *Jurek* court said:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same, predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. [footnotes omitted].

428 U.S. at 274-76.

To establish "dangerousness" the Commonwealth must prove beyond a reasonable doubt that there is a "probability" that the defendant would commit "criminal acts of violence" such as would pose a "continuing serious threat to society." We see no constitutional vagueness in that language.

In our view, it is designed to focus the fact-finder's attention on prior criminal conduct as the principal predicate for a predic-

tion of future "dangerousness."[4] If the defendant has been previously convicted of "criminal acts of violence," *i.e.*, serious crimes against the person committed by intentional acts of unprovoked violence, there is a reasonable "probability," *i.e.*, a likelihood substantially greater than a mere possibility, that he would commit similar crimes in the future. Such a probability fairly supports the conclusion that society would be faced with a "continuing serious threat."

It also appears that the language defining the second aggravating circumstance, *i.e.*, the "vileness" of the defendant's conduct in committing the crime, is the same as that in the Georgia statute upheld in *Gregg*. Since any act of murder arguably involves a "depravity of mind" and an "aggravated battery to the victim," it is conceivable that the language defining the second aggravating circumstance could be tortured to mean that proof of an intentional killing is all the proof necessary to establish that circumstance. We regard such a construction as strained, unnatural, and manifestly contrary to legislative intent. The General Assembly was selective in choosing the types of intentional homicide it felt justified a potential sentence of death; clearly, then, it did not intend to sweep all grades of murder into the capital class.

Hence, we construe the words "depravity of mind" as used here to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. Contextually, we construe the words "aggravated battery" to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder. *See Harris* v. *State*, 237 Ga. 718, 230 S.E.2d 1 (1976), *cert. denied*, 431 U.S.

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[4] It should be noted that, while prior criminal conduct is the *principal* predicate, the statute provides a further predicate, *viz.*, "the circumstances surrounding the commission of the offense of which [the defendant] is accused."

933 (1977).[5] It seems to us that these are the only constructions rationally related to the commonly accepted connotation of the prefatory words, "outrageously or wantonly vile, horrible or inhuman."

We note in passing that the Virginia statute contains a constitutional safeguard not explicitly articulated in the Texas statute. The 1977 law provides a list of mitigating circumstances which the fact-finder is required to consider *in pari materia* with aggravating circumstances. The list is illustrative and not exclusive; the statute expressly provides that facts in mitigation "may include, but shall not be limited to" the items codified, and that evidence may be adduced to show "any other facts in mitigation of the offense."[6] Code § 19.2-264.4B. Although the Texas statute was silent in this respect, it was found to be constitutionally sufficient on the grounds that the Texas Court of Criminal Appeals had "indicated that it will interpret . . . [the statute] so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." *Jurek*, 428 U.S. at 272.

IV. THE PENALTY TRIAL

A. Commonwealth's Instruction "1"

Defendant challenges Commonwealth's Instruction "1" because, he says, it fails to advise the jury that, even though it

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[5] *See also* Florida's construction of other language defining a similar aggravating circumstance in *State* v. *Dixon*, 283 So.2d 1, 9 (Fla. 1973), cited with approval in *Proffitt*, 428 U.S. at 255.

[6] These provisions are clearly in accord with the mandate of *Roberts* and *Woodson* as interpreted in *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) where Chief Justice Burger for the Court states:

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [footnotes omitted].

may find aggravating circumstances, the death penalty is not mandatory.

Code § 19.2-264.4C provides that the death penalty shall not be imposed unless the Commonwealth proves one of the two aggravating circumstances beyond a reasonable doubt. The statute does not require that, upon such proof, the jury *must* impose the extreme penalty but only that, absent such proof, it shall *not* do so. By requiring the jury to consider circumstances both in aggravation of and in mitigation of the offense, the statute clearly contemplates that, notwithstanding a showing of the former, the jury is at liberty in consideration of the latter to recommend the lesser penalty. Such discretion in the sentencing authority is not constitutionally infirm. "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."[7] *Gregg*, 428 U.S. at 199.

We agree that the instruction was not artfully drawn. Yet, we are of opinion that, read as a whole, it fairly expounds the thrust of the statute. Reciting the statutory command that the death penalty "shall not be imposed" absent a showing of aggravating circumstances, the instruction told the jury that it "may fix . . . punishment at death." What a jury "may" do it is at liberty not to do.

B. Rebuttal Argument By Commonwealth

Defendant maintains that the trial court erred in permitting the Commonwealth to make a closing rebuttal during the penalty trial. That procedure, he says, "places undue emphasis on the aggravating circumstances."

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[7] We reject the thesis that, because the statutory alternative to the capital penalty is one which permits parole, the sentencing authority is constitutionally overbroad. Surely, mercy by parole is not unconstitutional.

The argument defendant makes was upheld in *People* v. *Bandhauer*, 66 Cal.2d 524, 530-31; 58 Cal. Rptr. 332, 336-37; 426 P.2d 900, 904-05, *cert. denied*, 389 U.S. 878 (1967), under the following rationale:

> The prosecutor's burden of proving guilt beyond a reasonable doubt at the trial on the issue of guilt justifies his closing the argument as well as opening it. At the trial on the issue of penalty, however, neither side has the burden of proving that one or the other penalty is the proper one in the case at hand, and there is no logical reason to favor one side over the other in argument.

But, as we have just noted, Code § 19.2-264.4C places upon the Commonwealth the burden of proving aggravating circumstances beyond a reasonable doubt. For more than a century, the rule in Virginia has been that "the party having the affirmative of the issue has the right to open and conclude the argument before the jury." *Doss* v. *Commonwealth*, 42 Va. (1 Gratt.) 557, 560-61 (1844). In light of the statutory command, we decline to change the rule here.

V. PROPRIETY OF THE SENTENCE

A. Product Of Passion

Defendant urges us to commute the death sentence to imprisonment for life. The sentence, he says, was the product of "passion, prejudice, or other arbitrary factors." He reasserts his arguments that the photographs of the victim's body and the testimony of her daughter inflamed the passions of the jury. The same was true, he contends, of the repetitious reading of his confession, once during opening argument, once during the evidentiary portion of the guilt trial, and once during the penalty trial.

At the penalty trial, the Commonwealth introduced evidence, *inter alia*, that defendant had been previously convicted of an earlier crime of forcible rape and psychiatric testimony concerning the possibility that he might commit future crimes of violence. Confining himself to cross-examination of the Commonwealth's witnesses, defendant offered no

independent evidence of circumstances in mitigation of the offense. In argument, the only mitigating factors stressed were defendant's good behavior during incarceration, the prospect of rehabilitation, and the probability that, if sentenced to prison for life, defendant "would be in his sixties before he would even be eligible for parole." The written verdict recited a finding of both aggravating circumstances. Although the jury was told that it might yet impose the lesser penalty, it unanimously recommended a penalty of death. Based upon its consideration of "all of the evidence in the case, the report of the Probation Officer, the matters brought out on cross-examination of the Probation Officer and such additional facts as were presented by the defendant," the trial court entered final judgment confirming the penalty recommended by the jury.

We assume that the jurors were aroused by all they had heard and seen concerning conduct which they found to be "outrageously or wantonly vile, horrible or inhuman." And no doubt they were moved by the plight of a young daughter in the loss of her mother. Yet, we cannot say that, absent the trial incidents of which defendant complains, the jurors would have been less so or that they would have recommended a different penalty.

We are, therefore, of opinion that the sentence imposed was not the product of invidious passion, prejudice, or other arbitrary factors but the product of a reasoned judgment grounded in the evidence and in accord with the law.

B. Excessiveness

This Court is directed to determine whether the penalty imposed is "excessive or disproportionate to the penalty imposed in similar cases," and, in aid of that determination, we are empowered to "accumulate the records of all capital felony cases tried within such period of time as the court may determine."[8] Code § 17-110.1E (Cum. Supp. 1978).

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[8] Pursuant to Code § 17-110.1E, we have this day entered an order

On brief, defendant addresses this question in only two sentences. Although "there have been convictions for rape-murder in Virginia in recent years," he says, "no defendant has been subjected to the death penalty in Virginia in almost sixteen years."

Manifestly, since this is the first case to be reviewed under the 1977 law, no records of cases involving the particular crime charged in the indictment are available for comparison with the record here. Capital cases tried and reviewed under prior laws involved offenses definitionally different from the one at bar. Among a host of such cases, defendant cites none he considers fairly comparable to his case. Our own research has disclosed none in which a penalty less than death was imposed. On the other hand, we find that, of the 236 persons actually executed in the last seven decades, 232 had been convicted of murder or rape or murder in connection with rape. These figures do not, of course, include cases in which a death penalty initially imposed was set aside by the courts or commuted by executive clemency.

In consideration of the record as a whole and to the extent we can make a meaningful comparison with other capital cases decided in this Commonwealth, we hold that the penalty imposed in this case was not excessive or disproportionate. Finding no reversible error in the court below, we will affirm the verdict of guilty and the sentence of death.

Affirmed.

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directing the Clerk of this Court henceforth to segregate and accumulate the printed records and opinions in all class 1 felony cases, to maintain a current index of those cases, and to make the index, records, and opinions of this Court available for examination upon the request of any court of record in the Commonwealth or in the federal jurisdiction.

APPENDIX A

The Statutory Complex (Cum. Supp. 1977)

§ 18.2-10. Punishment for conviction of felony.—The authorized punishments for conviction of a felony are:

(a) For Class 1 felonies, death, or imprisonment for life.

* * * *

§ 18.2-31. Capital murder defined; punishment.—The following offenses shall constitute capital murder, punishable as a Class I felony:

. . . .

(e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape . . . .

* * * *

§ 19.2-264.2 Conditions for imposition of death sentence.—In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

* * * *

§ 19.2-264.3. Procedure for trial by jury.—A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

* * * *

§ 19.2-264.4 Sentence proceeding.—A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any Rule of Court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while

the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed _____ foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the

offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed _____foreman"

(E) In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

* * * *

§ 19.2-264.5. Post sentence reports.—When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.

* * * *

§ 17-110.1. Review of death sentence.—A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

B. The proceeding in the circuit court shall be transcribed as expeditiously as practicable, and the transcript filed forthwith upon transcription with the clerk of the circuit court, who shall within ten days after receipt of the transcript, compile the record as provided in Rule 5:14 and transmit it to the Supreme Court.

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

1. Affirm the sentence of death; or

2. Commute the sentence of death to imprisonment for life.

E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.

F. Sentence review shall be in addition to appeals, if taken, and review and appeal may be consolidated. The defendant and the Commonwealth shall have the right to submit briefs within time limits imposed by the court, either by rule or order, and to present oral argument.

§ 17-110.2. Priority given to such review.—The Supreme Court shall, in setting its docket, give priority to the review of cases in which the sentence of death has been imposed over other cases pending in the Court.

APPENDIX B

Voir Dire Of Mrs. Piggott

[BY MR. PERSON, COMMONWEALTH'S ATTORNEY]

Q. And do you understand in the first hearing that the jury will determine guilt or innocence of the Defendant?

A. Right.

Q. And do you understand that in the second hearing, the second part of this trial, that the jury, if they find the Defendant guilty of capital murder, will be asked to fix his punishment at life imprisonment or death?

A. Yes.

. . . .

Q. Now, do you have any religious or moral or conscientious scruples against giving somebody the death penalty in the proper case?

A. I would say yes.

Q. Yes. You couldn't give anybody the death penalty, could you?

A. No.

Q. All right. And in fact, no matter what the facts were in the case, you couldn't put somebody to death, could you?

A. No.

Q. Nor could you vote for somebody to die, could you?

A. No.

Q. All right. So you are absolutely against the death penalty, is that correct?

A. I think so.

. . . .

[BY MR. WOOD, COUNSEL FOR DEFENDANT]

Q. All right. Now, would the fact that you had to vote first of all on guilt or innocence initially, now before any sentence were imposed, what I am talking about just voting on one thing, that's guilt or innocence of the accused, would the fact that the person could either get life or death, would that influence you decision at all in voting for guilt or innocence?

A. No.

Q. It wouldn't influence you, is that correct?

A. It would not.

. . . .

Q. Would the view that you hold about capital punishment compel you automatically solely on those views, would they compel you to vote not for the death penalty, or could you possibly vote for the death penalty?

A. Well, could you make that a little plainer. I didn't understand that too good.

Q. Okay. I assume from your answers, answering Mr. Person's questions, that you're somewhat opposed to the death sentence, is that correct?

A. Right.

Q. In the State of Virginia. All right. Would the views that you hold, that is your own personal feelings about the death penalty, would they compel you solely because of the views you hold about the death penalty, would they compel you, would that in other words, force you to vote for the death penalty, or could you possibly vote for the death penalty in a certain case depending on what the facts were, depending on what the evidence is in that particular case?

A. I guess I possibly could then, I guess. I don't know.

Q. Depending on what the facts are in any particular case, is that correct?

A. Yes.

[BY MR. PERSON:]

Q. Mrs. Piggott, you understand now, and excuse me if I repeat myself because it's very important to get your answers correctly because this is the time when you can—you as a person can tell Judge Carneal that you don't agree with the law; that you don't agree with the death penalty in this case, no matter what the case is, that you don't agree with it and nothing will happen to you. This is one time you can do that and you can tell Judge Carneal that you don't agree with the death sentence under any circumstances because you just don't feel it's right, and nothing will happen. Now, is that the way you feel?

A. No, not exactly. But—I don't know. I don't like—you know—to hear of that but I guess something have to be done if you're wrong, I guess.

Q. Let me ask you this. To make myself perfectly clear, you understand that the first trial will be—the jury will determine whether the defendant is guilty or innocent, is that correct?

A. Right.

Q. Now, knowing that the Defendant might be given death, could you if the Commonwealth proves its case beyond a reasonable doubt and if it was a proper case, could you find the Defendant guilty, knowing that he might be given death later on, or would you have to find him not guilty?

A. Well, I guess if he's guilty, I'll have to.

Q. You could find him guilty, is that correct?

A. Yes.

Q. Now, once you found him guilty, there would be only two punishments.

A. Yes.

Q. One would be life imprisonment and the other would be death. All right.

A. Yes.

Q. Now, if the Commonwealth proves its case beyond a reasonable doubt and it was a proper case, could you vote the death penalty for the Defendant?

A. I—

Q. Or would you have to give him life imprisonment?

A. I would say life.

Q. Life. All right. So no matter what—in the second half of the trial, after you found him guilty, in the second half of the trial, no matter what the Commonwealth evidence showed, and no matter what the law told you, you couldn't give a person death, is that correct? You'd have to give him life, is that correct?

A. Yes.

Q. So you are absolutely against the death penalty, is that correct?

A. Right.

Q. In any situation?

A. No.

Q. Is that correct?

A. Right.

[BY MR. WOOD:]

Q. Mrs. Piggott, you answered some questions for me before here, is that right?

A. Yes.

Q. Didn't you answer at that time that—when I asked you a question about whether or not you possibly could impose the

death sentence in some case, depending on the facts of that case?

A. Yes.

Q. That in fact you said you possibly could, is that correct?

A. Yes.

Q. Is that the way you feel, possibly you could. You wouldn't want to, but—but you possibly could?

A. Yes.

Q. So that your feelings are not absolute, is that correct?

A. Yes.

Q. So that your feelings are not absolute, is that correct?

A. Yes.

Q. That's correct?

A. Yes.

Q. You're not saying to Mr. Person and to the Judge that I don't care what kind of case it is, or how bad the case is, I absolutely could not impose it. You're saying you possibly could, is that correct?

A. Yes.

. . . .

[BY MR. PERSON:]

Q. So you are saying no matter how difficult if might be and no matter how painful it might be, and no matter who might criticize you, that under certain facts and under certain circumstances, that you could in a proper case, if the Commonwealth proved its case beyond a reasonable doubt, and this is when you have the choice between life imprisonment and death—

A. Yes.

Q. Under those situations you could vote that the Defendant would get the death penalty, is that correct?

A. I though I said lifetime.

Q. So you're absolutely against the death penalty, is that correct?

A. Yes.

CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY

DR. W. J. PILE—DIRECT

* * * *

[14] Q. The order of September 28, of this Court, directing you to examine Michael Marnell Smith is in the record, but to—be sure that you're familiar with the order, I'll show it to you now. This is the order of September 28. Do you recall receiving that order?

A. I do.

Q. Did you have any conversations with either of Michael Marnell Smith's attorneys before receiving this order?

A. I do not recall any conversation.

Q. Before conducting the examination, pursuant to this order, did you have access to or review any materials related to Michael Marnell Smith's case?

A. I did not.

Q. Specifically, am I to assume that you did not have any of the records or reports prepared by the staff at Central State Hospital in a previous evaluation?

A. I did not.

Q. Did you have access at that time to, [15] before the time that you conducted the examination, to Michael Marnell Smith's confession in this case?

A. I did not.

Q. Did you have access to any materials concerning his prior criminal record?

A. No.

Q. Did anyone on your staff conduct a social history intake interview with Michael Marnell Smith before you saw him?

A. No.

Q. Did anyone on your staff, before or after you saw him, conduct any psychological testing?

A. No.

Q. In the course of your own evaluation, did you or anyone else speak, in connection with your evaluation, to any member of his family or any other person aside from the Defendant himself?

A. No, the Defendant was brought in from the jail handcuffed. No member of the family came with him.

Q. At the time that he was brought to your office, and again for the record, I believe that was on October 1st, 1977, that's in the record.

A. Yes.

Q. What did you advise Michael Marnell [16] Smith regarding the purpose of the examination?

A. No advice was given.

Q. How did you describe to him the reason why he was being brought to your office?

A. I think it was understood he was there for an examination of his sanity.

Q. Do you recall specifically what you might have said to him at that time?

A. I do not.

Q. Did you make any, do you recall making any statements to him advising him as to the uses of any disclosures that he made to you concerning the circumstances of his offense or any prior criminal conduct?

A. No.

MR. BONNIE: Excuse me.

BY MR. BONNIE:

Q. Specifically, did you advise Michael Marnell Smith before or during the examination that any statements made during the examination could be used against him by the prosecution at either the guilt or sentencing phases of his capital murder trial.

A. No.

Q. Did you specifically advise him before or during your examination that he had a right to consult with his counsel or to have counsel present during the [17] examination?

A. No.

Q. Did you specifically advise him before or during the examination that he had a right to remain silent, concerning the circumstances of the offenses, with which he had been charged, or any prior criminal offenses?

A. No.

Q. Did you specifically advise him before or during your examination that he had a right to terminate the interview at any time?

A. No.

* * * *

[21] Q. For how long would you estimate that you interviewed Michael Marnell Smith on that day in October, October 1st, 1977?

A. About an hour.

Q. About an hour. No more than an hour?

A. No.

Q. Did Michael Smith's attorneys, before or after the examination, direct your attention specifically to the issues, which can arise in a capital sentencing trial in Virginia, which I would, for the purposes of the record, like to quote, whether the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance, or whether at the time of the commission of the capital felony, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law as significantly impaired or, finally, whether there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing serious threat to society? Did either of Michael [22] Smith's attorneys ever bring those issues directly to your attention before or after your examination?

A. No.

Q. Did you ever yourself consult these statutory provisions that I have just read?

A. No.

Q. Were they ever brought to your attention by anyone?

A. No.

Q. Whom did you notify of your conclusions during the—that you derived during the course of your evaluation, and by what means?

A. I wrote a letter to Judge Carneal, with carbon copies to Mr. Person and Mr. Pugh.

Q. Did you have any subsequent conversations after the time that this report was sent with either of Michael Smith's attorneys?

A. No. However, while I was out of the country, Mr. Pugh wrote to me and my associate answered him concerning the diagnosis and some questions Mr. Pugh had asked about the diagnosis that I rendered, which my associate, Doctor Cox,

and I think that letter may be in evidence as well.

* * * *

DR. W. J. PILE — CROSS

[26] Q. At the time that you had this examination with Mr. Smith, did you question him concerning any instances of his behavior of sexual nature other than the matter for which he was presently sent to you for examination?

A. I did.

Q. And did he respond to you at that time with any information about prior circumstances?

A. He did.

Q. Did he advise you, and I think your letter of October the 1st indicates, and you have a copy of that in front of you?

A. I do.

Q. In the first paragraph, about the fourth sentence from the bottom, says, "The client was asked if he had ever raped anybody before that episode, and he said that his lawyer told him not to talk about [27] that." Did Mr. Smith tell you—advise you that his lawyer had told him not to discuss instances which were not related to the present crime?

A. He did.

Q. Thereafter, did you request from Mr. Smith any further information concerning any instances which were not connected with the present offense?

A. No.

Q. Did he thereafter voluntarily give you information concerning an offense?

A. He did.

* * * *

[31] Q. You testified, Doctor Pile, that no one brought to your attention any of the requirements, which were read to you a moment ago, and just for the record, it's under Section 19.2-264.4 of the Code of Virginia. Those being that the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. Nobody brought that to your attention, as I understand it.

A. No, that's correct.

Q. During the course of your investigation, or your interview and study of this young man, were you in a position, had you been asked, to have given that opinion whether the offense was committed while Mr. Smith was under the influence of extreme mental or emotional disturbance?

A. I could have given an opinion, yes.

[32] Q. And what would that opinion have been?

A. That he knew what he was doing and was aware of what was happening.

Q. And do I understand that you found no evidence that he was suffering from any influence of extreme mental or emotional disturbance?

A. That is correct.

Q. Now, there was also, I understand, not brought to your attention that during the commission of the felony, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired. I understand no one brought that to your attention.

A. Yes.

Q. During the course of your evaluation, of this Mr. Smith, did you or were you able to have made an opinion as to whether his conduct, whether he was able to appreciate the criminality of his conduct and conform his conduct to the requirements of the law? Whether or not it was significantly impaired?

A. I felt he could.

Q. Had somebody asked you, you could have rendered an opinion on that element?

A. I could have.

Q. And what would that opinion have been?

[33] A. That he was competent, that he understood what was happening, and that he knew full well what his actions were and the results thereof.

Q. Now, you were also asked whether anybody brought to your attention whether the accused would commit criminal acts of violence that would constitute a continuing serious threat to society. No one asked you that, did they?

A. I don't believe so, no.

Q. You were not even asked that during the trial, were you?

A. I don't believe so.

Q. You were also asked, Doctor Pile, whether you gave Mr. Smith any advice or any warnings that he could remain silent or that he could consult with his attorney, and you answered that you did not. Can you explain to us any reason why you did not give any such advice?

A. The purpose of the examination was to establish his insanity and the—when I do an examination, I do it cold, and frequently don't know anything about the person or what's happened to them. And no one advised me that I was supposed to or that he was entitled to this information, so I never—it never occured to me. I never asked anyone that question. I just examine [34] them and give my opinion. In order to do that, I, of course, need them to be truthful.

* * * *

[36] REDRECT EXAMINATION

BY MR. BONNIE:

Q. Doctor Pile, I'd like to go back to the question of experience that Mr. Culp covered that you have had in forensic evaluation. You mentioned that you have very frequently done competency to stand trial evaluations?

A. Yes.

Q. And that you have also, I think you said, frequently done sanity at the time of an offense evaluation. Ordinarily in connection with sanity at the time, on whose referral do you conduct those evaluations?

A. The referral from the defense lawyers.

Q. Customarily from the defense in your normal practice?

A. Right.

Q. Was this case unusual in the sense that the Court, the order was issued by the Court, and that the report was sent to the Court rather than the defense attorney?

A. Yes.

Q. This was unusual?

A. Yes.

[37] Q. Also—

A. It was not—let me clarify that, if I may. Usually when defense attorneys ask me to see patients, clients who are in jail, it is a matter of finances, and so they put in the order for an opinion, and in which the State then, I think, pays the bill. And the State has a certain money, I guess, allocated for that, and the report always go to the defense, go to the judge, and goes to the prosecuting attorney. So in that case, I assume this was the reason why it was referred this man to me.

Q. All right, let me be very explicit about these points.

A. All right.

Q. In your general practice, as you review your experience in the past, do a—a majority or substantial portion of your

referrals come from attorneys who are representing defendants who are not indigent?

A. No, the majority that I have seen recently have been indigent patients.

Q. Recently. With regard—

A. For the last two years.

Q. Over the last two years?

A. Yes, I have been in practice twenty-five years.

[38] Q. Right. When you referred earlier to the—your practice in conducting sanity evaluations and competency to stand trial evaluations, you were referring, I presume, to the overall course of your professional career?

A. That's correct.

Q. In that contention, have most of your referrals been from the defendants who, excuse me, from attorneys who are representing defendants who are not indigent?

A. Yes.

* * * *

CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY

[76] DR. C. R. SHOWALTER—DIRECT

* * * *

Q. In your experience under the capital sentencing procedure in Virginia, over the last two years, what has been the ordinary and customary practice of attorneys in capital cases with regard to the degree of specificity in a—in the Court order directing you or the clinic to perform these evaluations?

A. These Court orders have been, again as I recall, rather specific. They have, as you might expect, addressed the entire gamut of potential psychiatric psychological disfunction. We read the statute to give broader base for psychiatric input at the sentencing phase than say would be the case if we were purely attempting to throw some light of the mental state at the time of [77] the offense or competency, but the whole spectrum, latitude was given for the full spectrum of the evaluation in the Court orders.

Q. Specifically, has it been the customary practice in the Court orders to specify the clinic or you, on behalf of the clinic, should evaluate a defendant for the purpose of determining, and I quote, "that—whether or not the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or whether or not at the time of the commission of the capital felony the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired"?

A. These were the basic questions.

Q. And these are typically specified?

A. In the Court order, yes sir.

* * * *

[78] Q. Remaining close to the facts about which you have personal knowledge, has it been typical that the attorneys have spelled out in the Court orders that the reports would be sent only to the defense attorneys?

A. This has been spelled out in our experience.

Q. Has it also been customary to include in the—Court orders statements concerning whether any statements made by the defendant, which have an incriminating nature, can be used against the defendant by the prosecution?

A. In these Court orders, it has been clearly established that the—we will warn or inform the client as to the potential uses of the evaluation; i.e., [79] what is this examination actually for. In the case—these capital—evaluations of mental state for people convicted of capital offenses, are somewhat different. Contrasting it just for a moment with the insanity defense, this is usually raised by the defendant himself or herself, the assumption being that if an insanity, some issue relevant—to making a case for an insanity defense is established, that the psychiatrist will testify in behalf of the client or defendant. In this respect.

It is somewhat different, however, in the capital sentencing evaluation, unless this is very carefully spelled out in the Court order. Because, and—and to that end, we inform the client that we may be called upon to give input at the sentencing proceeding, and then it becomes a matter for the client or the client and his attorney to draw the appropriate lines from that point.

Q. Typically, then, you advise the client that the use to which the report will be put or any disclosures that will be made will be in the hands of his attorney?

A. That is correct.

Q. Is it possible, in your opinion, from a clinical standpoint, to render an informed expert opinion regarding a defendant's mental state at the time time [80] of an offense, if the defendant refuses to discuss the circumstances of the offense with you?

A. There is now way that I can do this.

Q. Is it possible, from a clinical standpoint, in your opinion, to render an informed expert opinion regarding an offender's future behavior, specifically his amenability to rehabilitation or his likelihood for recidivism if he refuses to discuss his prior criminal conduct with you?

A. No.

Q. It is not possible?

A. It is not possible.

* * * *

[92] Q. In your opinion, is a—psychiatric interview, which is limited to one hour interview, without the benefit of formal social history or formal psychological testing, which involves discussions only with the client, and with no one else, an adequate basis or is it likely to be an adequate basis, in your own professional opinion, for diagnosing that person as an antisocial personality, or in terms that are otherwise used, a sociopath?

A. I do not think so, and the reason I say this is because—in any way I can figure this out myself, it would be virtually impossible to cover all of the necessary points, as I have previously outlined here this morning. It is a physical impossibility or temporal impossibility in getting all this material in, in the course of—one hour, plus or minus a few minutes.

Q. Could you describe, based on your [93] own knowledge about the diagnosis of sociopathy or anti-social personality disorder, what the formal requirements in order to support such a diagnosis, clinically, would be?

A. Again, as mentioned earlier, the historical components of the psychiatric evaluation are extremely important. These historical components must be elicited, in my opinion, by the clinician. It's also very important to have this historical documentation corroborated through the social history that, hopefully, has been taken and recorded previous to the psychiatric evaluation. One must inquire very carefully about the family relationships; one must inquire very carefully about school record, both academically and socially.

In fact, when evaluating an individual, in which there appears to be a consideration of a diagnosis of sociopathic personality, the clinician should examine the client with the basic ideologic genetic factors in mind; i.e. what are the factors as we understand it today that give rise to—the so-called antisocial personality or sociopathic personality disturbance. And I'll not go through the entire cataloging here but to mention a few.

Number of studies indicate that early parental deprivation is extremely frequent and significant factor of later sociopathic disturbance. [94] Inconsistent parenting, one parent standing for one thing and one parent standing for something else, the youngster growing up in the vortex of dissension of experiencing the dissension of this clash of opinions on the part of—of parents. The person who is moving toward these types of personality deterioration will evidence early in life the likelihood of significant interpersonal disturbances.

The Diagnostic and Statistical Manual Number III, which is—I suppose, at the moment in press, but speaking from the draft, of this, with respect to these diagnoses, and I might add that the sociopathic personality disturbance is one of the diagnoses that the Committee on Nomenclature of the APA has really honed in on as far as refining and crystallizing as much as possible the diagnosic ingredients, shall we say. The new construction of this diagnosis will insist that significant aberrations in interpersonal relationships were clearly in evidence

prior to the age of fifteen, to give but one example of a long catalogue that I'll not go further into at the moment.

Q. Is it accurate to characterize the—the approach of the Diagnostic and Statistical Manual Number III, that you have been quoting, as being more objective in character—

A. This is the intent in mind.

[95] Q. Than the present?

A. This is the intent of this—elaboration of diagnostic criteria.

Q. The notion that this is a draft of a new Diagnostic and Statistical Manual may imply that this is a—a change in approach within the profession. Would you regard this as a change in approach or merely a codification or statement of what has been the standard approach within the field of forensic psychiatry?

A. No, I would say it—this reflects a change in approach. I think the diagnosis of sociopathic personality disturbance, which admittedly is somewhat diffuse in the Diagnostic and Statistical Manual Number II, has been all problematic for all clinicians, and more problematic for forensic psychiatrists who work a good bit in forensic settings. And the—again, the Committee on Nomenclature and Diagnosis has addressed this issue specifically, I think, arising out of the considerable frustration with this diffuseness and impreciseness of the diagnosis.

Q. Picking up the very point, based on your understanding of the standards generally accepted within the field of forensic psychiatry, based on your understanding of the literature, the history of the Diagnostic and Statistical Manual revision and presentations [96] at scientific meetings, would it be consistent with these generally accepted standards, nationally, to diagnose a person as an antisocial personality or a sociopath after having interviewed the defendant only for a one hour period on

a single occasion, without repeating all of the other assumptions I have been making?

A. I simply do not see how this is possible.

Q. This is not possible?

A. There is not enough minutes in an hour.

Q. And not consistent with standards generally accepted within the field?

A. That's correct.

* * * *

[114] Dr. C. R. SHOWALTER—CROSS

Q. I'll rephrase the question, Doctor Showalter. You indicated that the new definition, if that's what I might call it, about sociopath indicates that he has to have certain traits prior to fifteen. And what traits are we talking about?

A. That was—your question certainly, second rephrasing of the question clarifies that point, because it can be any type of trait that would be the antecedent of anything that could become antisocial at some point later on in the life of the person.

Q. Now, are you saying that if a person has not exhibited any antisocial traits prior to fifteen, that under no circumstances a psychiatrist could find and diagnose that he is a sociopath?

A. Well, that—illustrates precisely the difficulty that one can get in, in diagnostic issues. You cannot deal—you cannot single one specific thing out, isolate it unto itself, and say that that has definitive or can—you can't ascribe to it definitive weight for diagnostic purposes.

Q. Isn't that what you did, Doctor Showalter?

A. No sir.

Q. Didn't they ask you to read the last sentence, and you said that based on that, that you [115] could not have made a finding that he was a sociopath?

A. I—lifted this one sentence out as illustrative, Mr. Culp, of one facet of the problem in making the diagnosis of sociopathic personality or antisociopathic personality disorders.

Q. Do I understand you correctly, even though a person may have exhibited no antisocial traits prior to reaching the age fifteen, that that does not mean that a psychiatrist could not diagnose him as a sociopath?

A. Under DSM-III, if you would like me to read the whole categorization, I'll be happy to do that, but certain tendencies have to be at least in evidence in a rudimentary fashion prior to age fifteen.

Q. All right, let's see if we can't get to the answer yes or no, Doctor. Right now, you've already read into the record what the new scheme definition is.

A. Part of it.

Q. All right, are you saying, and I think you can answer this yes or no, Doctor, and if you want to explain later, that would be all right. Are you saying that under no circumstances that a person who has exhibited no antisocial traits prior to fifteen, can never ever be diagnosed a sociopath, either yes or no?

A. There is no yes or no answer, Mr. Culp.

* * * *

[118] Q. Now, you talked about having this clinical thing up at Charlottesville, and that you have been involved in five capital cases in Virginia since the new law.

A. That is correct.

Q. When were you involved in the first case?

A. I can't give you a specific date. I would—as I recall, though, at what—

Q. If you can give me the name, maybe I'll help you out.

A. The Johnson case, I think, was the first one.

Q. Okay, there were, I think, at least three cases prior to Johnson case. Are you familiar with them?

A. I can't—

Q. The Smith case, Alton Way case—

A. Yes.

Q. And Morris O'Dell Mason from Eastern Shore, are you familiar with that case?

A. I know those cases by name.

Q. All those cases had been tried prior to the time you got involved?

[119] A. Yes.

Q. So do you have any idea what the date that was, what year we're talking about?

A. The Johnson case?

Q. Yes.

A. I think the evaluation took place last summer, as I recall, Mr. Culp. June, July.

Q. Now, as part of this forensic psychiatry, you keep you with the law, do you, as to how it applies in criminal cases?

A. Our institute does.

Q. Well, do you do that?

A. Thats not my major function.

Q. Well, are you familiar with some of the cases?

A. Somewhat familiar, I might say.

Q. What about the case of Smith versus Estel, that was decided by the District Court in Texas, in March, 1978, are you familiar with that?

A. Yes sir, yes sir.

Q. In that case, it's where they raised all those allegations about psychiatric evaluation on dangerousness, didn't they?

A. Yes sir.

Q. And in that case, isn't it true that [120] the judge set aside the death penalty of the Texas Court based on several of the things that you have testified to today, such as the defendant had not been given his rights to remain silent? You testified to that.

A. Yes.

Q. Such as the defendant had not been given a warning as to—that it might be used against him. That he might remain silent.

A. Yes sir.

Q. That he had a right to an attorney.

A. Yes sir.

Q. All those things came out in the Estel case in 1978, didn't it?

A. Yes sir.

Q. All right. Now, you started getting involved last summer?

A. If that was the date of the Johnson case.

Q. All right. I mean I don't know the date of the Johnson case myself, but I mean we're talking about relative dates now. I'm not saying whether was June 1st.

A. Okay.

Q. In the cases that you have worked in, the five cases, haven't the defense attorneys come to see [121] you or somebody approached you about having those five defendants examined in your clinic?

A. Yes sir.

Q. Did you not discuss with them what should be put in the Court order?

A. I think we had a conversation on that.

Q. And, of course, you asked them to put in there that the record should go to the defendant, right?

A. Yes sir.

Q. You asked them to put in there that you should evaluate these two matters that are set out in 19.2-264.4, didn't you?

A. Yes.

Q. You also asked them to set out in there whether you—I assume, whether you should make any determination of dangerousness?

A. Yes sir.

Q. Did you also have them set out in the order that they have—they should advise or the doctor or the physician yourself should advise the patient that he has a right to remain silent?

A. Yes sir.

Q. All of that, didn't that, Doctor Showalter, come from this Estel versus Smith case, or Smith [122] versus Estel, which is found in 445 Federal Supplement 647?

A. I did not construct the Court orders, Mr. Culp, so I cannot answer that question.

Q. Didn't you talk to the attorneys about what to put in there, based on what was in this case?

A. Not necessarily based on what was in that case, no sir.

Q. But there's no question that's what is in this case, isn't it?

A. Yes, I've read them, certainly.

Q. So, in other words, when you say that the attorneys, with whom you have worked, that they normally have these things put in the order, is because you told them to put it in, isn't it?

A. We consult with the attorneys prior to the evaluation, Mr. Culp.

COURT: I'm not quite sure I follow the answer. Are you saying, Doctor, that the attorneys suggested this be put in, or are you saying you suggested to the attorneys that this be put in?

A. Your Honor, I would raise the question to the attorneys in the situation like this, the issue of self-incrimination, the issue of the possible utilization or scope of my findings, et cetera.

[123] COURT: It was your suggestion, really, then, that these things got in there?

A. And then the attorney would—would do what needed to be done to formalize this in the Court order.

COURT: No attorney came to you with an order already prepared and saying, "Doctor, these are the things I think ought to be in there"?

A. I'm not—I can't answer that specifically yes or no, but it's—likely that our consultation influenced, to some extent, the Court order.

COURT: All right.

BY MR. CULP:

Q. Isn't it a fact, Doctor Showalter, that different psychiatrists use entirely different systems of classification?

A. I'm not sure I understand your question. When you—if you could further define "different systems of classification."

Q. I mean don't they—does everybody who is practicing psychiatry do it exactly the same way?

MR. LOWE: Objection, your Honor, I don't think that question is suspectible to an answer, doing the same way. Do what the same way? Do the same technique in consulting, testing?

[124] COURT: I think the way you worded the question is probably objectionable. I think you should reword the question.

BY MR. CULP:

Q. All right. Well, let me ask you this. Wouldn't it be a fair statement to say that psychiatric conditions are subject to much dispute among psychiatrists?

A. Psychiatric conditions—

Q. Conditions.

A. Are much—in much dispute?

Q. In dispute among psychiatrists.

A. In respect to what?

Q. Suppose you had a woman who claimed she was Joan of Arc. Couldn't a psychiatrist say, for example, come up with a conclusion she was confused, one of them might come up with the conclusion she was psychotic, and one might come up with the conclusion she was delusional?

A. But those are neither mutually exclusive or mutually inclusive, Mr. Culp.

Q. Doesn't it show you don't always arrive at the same opinion? If you had three psychiatrists examine an individual,

would it be impossible or improbable that you would get different diagnoses?

[125] A. It would not be impossible to get some variation in diagnosis, but it's a matter—it's a matter of degree, I think, and—I would not want to—to respond to your question in such fashion to indicate in such fashion that would indicate that there is little or no diagnostic reliability among the various mental syndromes of mental disease and disfunction.

Q. Doctor Showalter, how many times have you testified in Court.

A. Several dozen or more.

Q. Would it be fair to say that on many instances that you have found yourself in disagreement with other psychiatrists who are also testifying?

A. Probably not in total disagreement, but—the—the disagreement to some degree or another, yes sir.

Q. All right. For example—

A. There's disagreement for today, for example.

Q. Yes. That's the point. In other words, would it be fair to say that you have been called into cases where the issue was the sanity of the defendant, and you put on testimony that, in your judgment, in your evaluation, that the defendant was insane? Have you ever been called upon to do that?

[126] A. I have.

Q. And at the same trial, have not the State put on psychiatrist, who have said in their evaluation and their judgment and their opinion that the same, very same defendant is, in fact, sane?

A. Surely.

Q. So you have been in conflict, wouldn't that be a fair statement?

A. That's true.

Q. So wouldn't that be—couldn't you draw from that that psychiatrists, when they look at an individual and examine him, may see the same thing perhaps, but simply conclude that it's a different illness?

A. This is possible up to a point. There's a latitude rather than areas of mutual inclusion or exclusion. I think it's terribly important to keep that in mind.

Q. Have you ever examined Michael Marnell Smith?

A. I talked with Mr. Smith on one occasion. I have not technically examined Mr. Smith.

Q. You don't know whether he's a sociopath or not do you?

A. I have not conducted the examination that would—allow me personally to render an opinion.

[127] Q. I understand. Now, you said you didn't believe that it would be possible to bring in—if I have it incorrect, you correct me. That it would be impossible, at least you didn't think you could, rule or make an opinion that a person was a sociopath based on a one hour interview.

A. That is correct.

Q. Now, let me see if I understand you correctly. Are you saying it cannot ever be done, or you just don't think you can do it?

A. I don't think that I could do it, and I would have serious question about anyone doing it, simply for the reasons not—this doesn't—reflect on anyone's qualifications, capabilities or diagnostic skills. It's a matter to thinking back to some of the discussion this morning, it's a time factor, how much verbalization can you compress into the actual running time of one hour.

Q. Doesn't a lot of that depend, Doctor Showalter, how cooperative the patient is?

A. Let's assume a maximally cooperative patient.

Q. You're saying that—even on the maximally cooperative patient, you don't think anybody could do it?

A. I would have—real question and [128] reservation about it, Mr. Culp. But let me say again, to be very, very clear on this, the limiting factor here is not the clinician. It's just that a person cannot say enough words in the course of sixty minutes. Fast enough.

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CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG
AND COUNTY OF JAMES CITY

* * * *

[172] DR. J.C. DIMITRIS — DIRECT

* * * *

Q. Let me turn to that, now. What did you actually advise Mr. Smith regarding the purpose of the examination and the possible uses of any disclosures, which he made to you, the first time you saw him?

A. Yes sir. What I advised, your Honor, the Defendant at that time was, first, I identified myself as "I'm Doctor Dimitris, the psychiatrist in forensic unit, and based on the Court order, I'm invited to examine you." At that time, the initial order was for competency to stand trial. It was another letter I got from Mr. Person, the Commonwealth Attorney of this City, that advised me that he was submitting additional information pertaining to the competency at the time of the alleged offense. And he wanted me to expand on that in my final report to the Court.

Q. May I interrupt?

A. The initial warning to—

Q. Let me interrupt. At that point, it was on the request of the Commonwealth Attorney—

[173] A. Yes. I have a letter.

Q. That you inquired into the insanity at the time of the offense?

A. I have a letter. I don't know if it is part of the record.

Mr. Bonnie: I don't think so. I have not seen it.

Your Honor, I don't believe that this is already part—of the Court record in this case. If Doctor Dimitris doesn't mind, I

would like to have a copy made and have it entered as Petitioner's exhibit.

A. I ask that I be allowed to have a copy of that for my record.

Mr. Culp: I have seen it.

Mr. Bonnie: Have you a copy of it?

Mr. Culp: I don't have a copy, but I have seen it.

Mr. Bonnie: At sometime, we'll get a copy and submit it as Exhibit Number Four.

(At this time, the letter was received and marked as Petitioner's Exhibit Number Four.)

By Mr. Bonnie:

Q. I'm sorry. You may continue, the question being what did you tell Mr. Smith.

[174] A. Identified myself and the purpose of the examination. That I told him that it is now his privilege to elaborate on the given subject, because I asked him if you knew the charges. He responded, giving me the outline of the charges. Rape and murder. And I told him that, "I'm here to listen to you, to anything you want to say, provided you understand that this is going to be part of the record, and the record will be used one day against you in a Court of Law." That was the warning.

* * * *

[176] Q. With regard specifically to the nature of the warnings, that you gave, I just have a series of specific questions given the content of the warning that you actually gave him. In the statement that you've reported, did you tell him specifically that the information that was obtained in the course of the evaluation could be used against him in connection with the capital sentencing proceeding that might be held in Virginia?

A. No sir. I didn't mention the word "capital" punishment. I mentioned to him that whatever he would say to me during

the transaction with me and the personnel, it would be used against him in a Court of Law [177]

Q. In a Court of Law. Yes sir. Did you specifically tell him before or during your examination that he had a right to consult with his counsel or to have counsel present during the examination?

A. No, your Honor, I didn't mention about the counsel being present, because I can explain why not, if that's interest to the Court.

Court: The question is did you tell—did you tell him.

A. I didn't tell him about the lawyer being present, but I told him that any time he wanted to consult with his lawyer was perfectly all right, because the lawyer was already involved in the case, actively. So—this is my warning to everybody, if you like to talk to your lawyer, at any time, feel free to do so. But I don't invite lawyers to be present during my examination.

Q. This was—your practice in 1977, when you—

A. All along.

Q. Okay.

A. All along.

Q. Did you tell him during the course specifically tell him during the course of the examination [178] that he had a right to terminate the interview or the evaluation whenever he chose?

A. Not in these words, your Honor. I told him that he had the opportunity to talk as much as he wanted about anything he wanted, provided he understood that this is going in the record, and that it was going to be used against him. So—this way, in my judgment, I made clear to him that he can start and finish any time.

Q. After you gave him the initial warnings that you have described, did you encourage Michael Smith to cooperate in the

interview and make disclosures to you in order to facilitate your own evaluation?

A. Now, the word, your Honor, "cooperate" maybe having—maybe has many connotations.

Court: He asked "encouraged." Did you encourage him?

A. Encouraged, this is another thing, which is a different question. Encouraged is giving him a cigarette to somebody who smokes.

Mr. Bonnie:

Q. Let me withdraw the question and ask you this. Did you tell him that it would be helpful to him—

A. No sir, I didn't.

[179] Q. If he cooperated?

A. I don't use the word "helpful." As being found in the Gibson case, it is—something that—without any investigation of the case, the word appeared in the final statement of the Court, but I never tell the people it's helpful to the person.

I might say, "It's helpful to me to understand the case," but not to the person, per se. I say, "It helps me to understand your case, but I don't know if it helps you, because whatever you say is part of the record, and the record may be used against you." And I tell them this, so I don't go with one word, "helpful." I say, "Whatever you say to me, it helps me to understand. If it helps you, you have to decide for yourself, because it goes in the record, and the record would be opened by the Commonwealth Attorney one day, and it can be used against you in a Court of Law."

And this is kind of broken record down, you know—to the simplistic language that is used for the defense. If he doesn't understand, I say, "Would you like to call your lawyer? Be glad to call your lawyer on my phone, talk to him."

Q. Let me ask you this question. Do you believe that you would—it would be possible for you to render an informed clinical opinion regarding a person's [180] mental state at the time of the offense if he were to refuse to discuss the circumstances of the offense with you?

A. Your Honor, most of them are not, the people, they don't remember, they didn't do it.

Court: They know nothing about it.

A. You know—so—it is helpful for me again, and I underline the word "helpful" for me. Not for the Defendant. To tell me as much as possible, anything he wants, because what I appreciate in the interview is the way the person talks, modulates his thoughts, makes sense or doesn't make sense. If he talks about the offense, so much the better for me. Again. How much it is for the Defendant remains to be seen. And I give a warning even today when the Gibson is clear, with regard to the stipulation of if you plead innocent, if you plead not guilty, that's confidential. If you plead insanity, it's a risky deal.

As I say, more often than not, ninety-five of the people state they don't remember, they didn't do it, somebody else did it, it was accidential bystanders, whatever. Unfortunately for me, but I understand the reasons that the person does it, because, after all, he sees the writing on the wall of what's going to happen if he be found guilty, I don't have that cooperation. And [181] the I write the letters to the defense and the prosecution. I say, "Gentlemen, would you kind—be kind enough to tell me the rest of the story?" And then I give you a kind of educated opionion, based on the hearsay, because until we go before the Court, nothing is factual. Everything is fantasy.

By Mr. Bonnie:

Q. Isn't, again, just to pick up on your testimony, isn't it true that it's not only helpful to you, but essential for you to discuss the circumstances of the offense with cooperative defendant, in order to be able to tell, to give an opinion about what the mental state of the person was?

A. If the person does it, so much the better for me, and hopefully for the defendant. I don't know about it.

Court: The question is, he asked you, is it essential that you get that information from the defendant or perhaps someone else, in order to have—

A. It is helpful. But essential, then we have to close the forensic unit, we don't get it.

By Mr. Bonnie:

Q. I said with regard to rendering an informed opinion, on which you would give expert testimony for or against concerning the person's mental state at the [182] time of the offense, not competency to stand trial at the time of the offense.

A. Yes, it is helpful for me. But if it is essential, as I say, I don't have it most of the time. So—

Q. In those cases you do not give opinions?

I give—opinion, hypothetical then.

* * * *

[186] Q. Doctor Dimitris, what has been has been your practice concerning this question of warnings since the Gibson decision was decided in the Federal Courts? Have you changed your practice, and could you describe in what [187] ways it is different now?

A. Your Honor, the way it is different now, as I mentioned briefly earlier, I tell now the defendant, the suspect, that I ask him if he knows about the charges, I get an idea that the person is together and can communicate with me, because if a person is psychotic, of course, I cannot go into the aspects of the crime at that time without having more awareness from his lawyer and anybody else as to what is the wish of the other side in regard to that, that situation. So for a person that is able to communicate with me, I tell them two things.

I say, "If, Mr. Street, you are intending to—plead not guilty to the charge involved, whatever you say to me is not going to be used against you in a Court of Law as a proof of criminal action. But if you planning to plead not guilty by reason of insanity, I wonder if you have discussed with your lawyer whether you should talk to me about the ingredients pertaining to the alleged offense or not. And if you didn't, would you like to call your lawyer and get his advice?"

Q. Would you say that one of the consequences of the revised warning procedure that you were following is greater and closer or greater possibility [188] of involvement of attorneys during the course of the evaluation process?

A. Well, most of the time, what I get is that—either "I don't have an attorney, yet, or my lawyer told me to tell you everything, or sometimes yes, I appreciate that, let me talk." And usually they—I call the attorney in my office and introduce myself, saying, "Would you now talk to your client?" Or if the client wants to have more privacy, "Get the public telephone downstairs and call your lawyer, and I'll allow you to come back and tell me what you want to do."

Q. All right. Turning to Mr. Smith's case, particularly again, at any time during the course of the conversations that you have described with Mr. Pugh or Mr. Wood, did either of them direct your attention specifically in any way to the issues that could be—that would be litigated in a capital sentencing proceeding? You were in the Courtroom this morning. I suppose I need not quote again.

A. Yes sir. So, the question?

Q. During the course of your conversation, did they direct your attention specifically to those questions.?

A. No, your Honor, I didn't have the opportunity to go into the specifics of the capital punish- [189] ment law, because, if memory serve me well, the—the case was approved by the

General Assembly that year.

* * * *

A. Yes, so, I believe the case was—the decision by the General Assembly was during that session, '77, that the law was not distributed yet to us in the State hospitals, or any other institutions, because it was enacted, I believe, sometime in July. So I didn't have the wording of the law, neither Mr. Pugh give me the wording of the law. He went into the ingredients of what the law provides, but not—candidly as 19.2-264.4, not as such, but—Mr. Pugh showed special consideration in regard to what was the finding. He was not—satisfied with the basics. He wanted to go into another facet of his life. And, of course, based on the fact that I wanted to avoid to expose Mr. Smith in problems later, I [190] wanted the guidance of Mr. Pugh as to what area of the life of Mr. Smith he thought were important for his case. And, therefore, we—worked in tandem with Mr. Pugh, either by his personal presence at Central State, not at the time of examination, of course, or by phone calls, directing us in regard to his status.

All in all, in summary, your Honor, I did have awareness of the law, per se. The first time I became aware of the law was before the last phase of the trial in here, when Mr. Person showed me the text of the law.

By Mr. Bonnie:

Q. Doctor Dimitris, when you say that—Mr. Pugh or someone brought to your attention the basic ingredients, what were you referring to?

A. Basic ingredients I mentioned, I believe, in regard to what transpired in regard to the offense. I'm not talking about, Mr. Pugh was anxious for me to cover certain things, which, in his judgment, were important in the overall evaluation of Mr. Smith. I'm not talking about the ingredients of the crime right now. I'm talking about the ingredients of his personality.

Q. You're not referring to the ingredients of the law?

A. Not of the law. Not the crime, per se [191] I'm talking about military service, religious experience, and things of that sort.

Q. What you were discussing with him were some broader components of your evaluation concerning his personality and so on?

A. Overall adjustment in life, mainly his military experience were different from his everyday life in Williamsburg.

Q. If I may ask: the question I asked you before again, at no time until Doctor—Mr. Person showed you statute on the day you came to this Court to testify, did anyone bring to your attention the, either a copy of the law or quote to you the specific mitigating mental abnormality provisions, which you heard me quote earlier today?

A. No sir, your Honor, until Mr. Person was kind enough to show me the law.

Q. In the course of the conversation that you had with Mr. Pugh or Mr. Wood, in which you discussed with them your findings or conclusions, was there any discussion of whether your testimony might be of interest to the defense in connection with the capital sentencing proceeding specifically, not now on the question of McNaulton or irresistible impulse, but specifically on the context of the capital sentencing proceeding?

[192] A. No, your Honor, it was—the capital sentencing was not—brought into play, so to speak, at that time. The thrust was it was any evidence of insanity, is the impulse, or any mitigation whatsoever.

Q. When were you first—when was the first time that you were asked to focus on—focus your clinical eye on the issues that could be presented at the capital sentencing proceeding, and by whom?

A. At the time I was—called by Mr. Person, when I was served the subpoena, he indicated that the trial was bifurcated. The jury would decide first guilt or innocence, and then go into

the final phase of imposition of sentence. At that time, I received a subpoena and a call by Mr. Person, indicating that I had to appear for the finalization of the case, and then I became aware that this man was going to be and not for the guilt or innocence any more, but for the disposition of the case.

Q. Did Mr. Pugh or Mr. Wood, in any conversation that you had, with them, direct your attention to the diagnosis rendered by Doctor Pile and discuss its possible implications with you at the capital sentencing—at the capital sentencing proceeding?

A. I don't recall that element.

[193] Q. Did you have any conversation with Mr. Pugh or Mr. Wood on the day of the capital sentencing proceeding, other than the time that you were in Court itself, any preliminary conversations?

A. I believe, yes, I saw both adversaries, the Commonwealth Attorney and attorneys for the defense, briefly that morning. Nothing that was discussed, except that Mr. Person asked me about—my testimony, what's going to be generally based on the evidence or based on the law.

A. You had conversation with Mr. Person concerning your testimony, but not with Mr. Pugh or Mr. Wood?

A. No.

* * * *

[204] By Mr. Bonnie:

Q. Doctor Dimitris, you heard the testimony, I suppose that's the easiest way to do it. I was willing to try to make a hypothetical question out of this. With all the assumptions that I would like for you to make, but you heard the testimony concerning Doctor Pile's evaluation.

A. Yes.

Q. You have been here all day, and I suppose that the easiest way to ask the question, do you think that met the minimum standards of competent evaluation in forensic psychi-

atry in order to answer the kinds of questions that are posed in a capital sentencing proceeding?

A. Your Honor, I have to tell you that [205] I don't know any specific standards, per se, in the field. It is a matter of organization of the examiner as to what he's aiming at and he's satisfied with his examination. Personally, I want to be able to do that in our time. This is my limitation. Probably I have half as much experience as Doctor Pile in the field, and, therefore. I have to plead to you I cannot do it in an hour's time. Now, what makes the difference in any business, and mostly in our field, is that the quality of the time, not the quantity. How much time you spend—

Court: Did you say it was not the quantity of time, but the quality of time?

A. That makes a difference. In other words, what I would like to know, at this time, is if Doctor Pile can produce any notes or a tape from the interview or stenographic representation, because oftentimes when—they send us patients on our patient basis, then we have a stenographic representation of the statements altogether. So I wonder if such documents exist. Then I would be willing to give you more accurate reflection on the work of Doctor Pile. Personally, as I say, I won't be satisfied to do it in forty-five minutes to an hour, because probably I'm limited mentally to do that, but—other people might do it.

* * * *

By Mr. Bonnie

Q. Doctor Dimitris, on the basis, keeping in mind the set of assumptions that we are operating under, one of which is that that letter contains the total of the clinically relevant material, including the areas that were covered and, by inference, and, by inference, the areas that were not covered, because they were not mentioned, and the degree of depth represented by those clinical observations, do you think that such an evaluation would—would be adequate, would meet the minimum standards of adequacy within the profession of forensic psychiatry

to deal with the kind of issues, I'm not talking about competency to stand trial, to deal with the kind of issues regarding mitigating mental [212] abnormality and prediction of future behavior that are most germane in the capital sentencing proceedings under Virginia law?

A. Now, the thrust of the question, your Honor, please correct me if I wrong, is that if this examination will be germane, relevant to be utilized for mitigation, or for—the deliberations pertaining to the capital sentencing law. In other words, how much relevant is this, how much this can help?

Q. No, that's not the question. Is the evaluation, contained therein, and under the assumptions that I have tried to carefully specify, adequate, according to the standards generally accepted within forensic psychiatry, based on the literature, based on your attending of professional meetings and training programs, to provide a clinical basis for expert opinion on the issues regarding mitigating mental abnormality, but I can quote, but I don't see any need to, and prediction of future behavior, which are the—among the central issues in a capital sentencing proceeding under Virginia law?

A. So if I understand, well, maybe I'm thickheaded. Again we're going to this examination, is of any relevance and usefullness in the final arguments about mitigation—

[213] Court: Let me rephrase the question, Mr. Bonnie. Maybe I can do it a little better.

Mr. Bonnie: Maybe you can do it a little better than I can.

Court: Based on this, the man who made the record, use that basis to testify as to the future behavior, and whatever the other thing concerning is that your question?

Mr. Bonnie: Concerning mitigating, concerning mental abnormality at the time of the offense as defined in the Virginia statute.

Court: Whether—

Mr. Bonnie: Is that enough of a basis, is it an adequate basis to provide to permit the expression of an expert opinion among—as defined within the context of the standards generally accepted within forensic psychiatry?

Mr. Culp: If it please the Court, I don't want to belabor the point, but I think that the record shows that the Commonwealth called Doctor Pile and didn't go into his evaluation at all.

Court: I think that's his point, Mr.—if I may make the point for the record, Mr. Culp. I think that his whole total reason we are here today, the whole reason we are here today at all is the fact that [214] Doctor Pile was called by the Commonwealth, and Doctor Pile wasn't asked these questions at all, but it was by the defense that these matters were brought out. And that's why he's here, claiming it was incompetent for them to do so. I am sometimes stupid, but I'm not exactly lost on these matters.

Go ahead, Mr. Bonnie.

Mr. Bonnie: I think I asked the question. I'm waiting for the witness to answer.

A. What I can say, your Honor, is that the diagnosis of sociopathy is not substantiated by the text, this text here.

Mr. Bonnie: That's the answer. Thank you very much, Doctor Dimitris.

That's all the questions I have.

CROSS EXAMINATION

By Mr. Culp:

Q. Doctor Dimitris, you indicated in your testimony that you were not shown or told about the specific matters in the sentencing proceedings in Virginia under Section 19.2-264.4 until you came to Court, I think, on the day for the sentencing hearing and talked to Mr. Person.

[215] A. Person.

Q. And my question to you is this. Did your examination, that you conducted without knowing about these two specific things, was it sufficient to allow you to draw an opinion on both of the issues, of which we have discussed today? That being was the felony committed while the Defendant was under the influence of extreme mental or emotional disturbance, or at the time of the commission of the capital felony, the capacity of the Defendant to appreciate the criminality of his conduct or conduct his conduct to the requirements of law was significantly impaired. did your examination allow you to draw an opinion on each of those issues?

A. Your Honor, I believe so.

Q. And what opinion did you arrive at?

A. In the first question about it was under extreme duress or stress, overwhelming situation, my awareness of the facts of the case, based on the statements of Mr. Smith, to the investigating officer, and then to me, did not indicate that the man was of any duress of anybody. Because not, it was not abducted, was not captivated, was not threatened or anything. Was a Good Samaritan type activity that escalated into a tragedy, by his own activity.

In regard to any other mitigating [216] circumstances that—for which he couldn't understand the criminality of the act, beyond mental illness, anything else, nothing else was in evidence, which could be a mitigating circumstance, per se. Because the man took other precautions to protect himself. He put the condom on, did other things to protect himself from disease, hoping he would be successful to get away. Unitl he was investigated by the officers here in the Williamsburg area, he didn't divulge any information to anybody, so was—clearly aware of the criminalilty of the act, and he didn't spill the beans to anybody.

Q. Doctor Dimitris, is it fair to say that psychiatrists frequently disagree over their diagnosis?

A. I hope, your Honor, it is not frequently, but it is not unusual either. Not frequently, but not usual.

* * * *

Q. I think you testified that in a psychiatric examination, it is the quality of material which is forthcoming, rather than the quantity of time [220] spent which would determine whether a psychiatrist can draw a—a satisfactory opinion.

A. Absolutely. I believe in every business, and more so in our field, what makes a difference is how much the time is utilized meaningfully. You can spend enormous time and spend days and days, and tell the Court, "I spent five days examining the defendant." That makes no difference if I spent five hours or one hour for that. The essence, what has been accomplished in this hour, what—really, topics have been dealt with and what depth.

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CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY

[232] D. F. PUGH—DIRECT

* * * *

BY MR. BONNIE:

Q. Mr. Pugh, the record indicates that you requested a psychiatric exam by Doctor Palmaz or Doctor Stokes, I think is the way it reads, which was ordered by the District Court on May the 26th. Why did you request that examination?

[233] A. I believe my thinking at that time was that due to the seriousness of the charges, and of the nature of the facts of the crime, that I had in my possession, as well as, I guess, trying to seek out and preserve and adequate defense, I felt that that would be a good approach to that. It was—more or less, I felt I had to assert it.

Q. I take it that you were not particularly concerned about Mr. Smith's competency to stand trial, but you were more interested in possible exculpatory defenses.

A. That, too. I was interested in exculpatory defenses and also, as I said, as I became familiar with the facts of the case, and I had, prior to asking for that report, the nature of the crime itself caused me to do it.

Q. You're, again, I'm interested in why. You thought that psychiatric testimony might be helpful at trial?

A. I felt that he should be examined by a psychiatrist due to the charges that he was charged with. And after having read the statement that he allegedly gave to the police.

Q. The record indicates that you requested a further examination at Central State Hospital, which [234] was ordered by the District Court on July 1. Why did you seek that examination?

A. Well, that's—with Doctor Dimitris?

Q. Yes.

A. I felt at that time that the—I called it, more or less, a short time approach that Doctor Stokes or Doctor Palmaz had done, and I still felt uneasy about the matter of—of his competency, or if, in fact, there was some other mental disorders other than him knowing right from wrong or him being sane or insane that I wanted to explore, realizing that—it was a bifurcated proceedings and if we got to the second stage of that proceeding, that any type of mitigation that I would have might be of benefit to him.

Q. In light of the—of your interest, which you just described, in psychiatric evaluation, why was the Court order issued on July 1, as well as the one on the 26th of May, limited to an assessment of competency to stand trial? The exact language of the Court order, "Does the person have substantial capacity to assist his attorney in his defense?" But focuses on competency to stand trial. Why weren't the concerns that you just described specifically articulated in the Court order?

A. I assumed that—that by having him up there for a period of forty-five days, I believe, [235] at that time, that they would give him a complete staffing, psychologicals and evaluations, and things along that nature, and I assumed that if there was something—I didn't feel they would be limited by the Court order. That was my impression.

Q. Okay. Turning now to the question of advising Mr. Smith as to how he should deal with these psychiatric evaluations. Did you specifically advise him regarding whether or not he should disclose and discuss the details of the offense or any other prior offenses, which he may have committed before the time he was committed to Central State Hospital?

A. Yes.

Q. Could you describe what your advice was, and try to recall, if you can, I know it's difficult, when you might have given that to him.

A. I can't give you the exact dates, but I know that when I was initially appointed to Mr. Smith, I think our first conversation, I think the first thing that I told him was that he was not to discuss this case with anyone other than myself. At that particular time, at the preliminary hearing, I was the only attorney appointed to represent him, and Mr. Wood came later and was appointed by the Circuit Court. I specifically told him, prior to the preliminary hearing on his charges, not [236] to discuss the case with anyone. With reference to the psychological evaluations that he would have received, that he did receive, prior to him being examined, I know I was present and Mr. Wood was present at a later date, but prior to that time, I had told him not to discuss the case or any offenses that he had committed in the past with anyone, and I believe he understood what I was saying at that time.

Q. Did you advise, apart from the general advice that you have just described, did you advise him specifically with regard to what his posture, in terms of disclosures and so on, should be during the course of the psychiatric examination at Central State?

A. I told him not to discuss the case with anyone, and I don't remember if I said "anyone and that includes the psychiatrist or a doctor," and I made it crystal clear, I know, on the—at the second time, in which we were appointed in Circuit Court, we went back to that room, the last room, and the main thing we wanted to determine that he would not in the future discuss any offenses that he may have committed that were not reported or any offenses or the present offense.

Q. When he was sent to Central State, were you concerned that he might not either be able to understand or follow your advice in the context of a [237] psychiatric evaluation, particularly in light of his prior experience with the police, and the statements he had given to the police?

A. No.

Q. This was not a matter of concern to you?

A. No. The reason being, well—the reason being is that—the reason I thought I had discovered, in our conversations together, the reason that he made the statement to the police. And I didn't think those same reasons existed.

Q. So it was your expectation, when he went to Central State, that he would not discuss the circumstances of the offense or any prior offenses with the psychiatric and psychological staff at Central State?

A. Basically, yes.

Q. Let's assume that Mr. Smith would have followed your advice. Did it occur to you then that an expert might be unable to render an opinion of the type that you were seeking concerning possible mitigation, that you described earlier in your testimony, if the client is silent regarding the details of the offense and regarding any relevant past history, including prior criminal offenses? Did this occur to you at that time that you were formulating your advice to him?

[238] A. No, it didn't.

Q. Did it occur to you at that time to get a, what we might call a protective order from the Court to the effect that any incriminating disclosures, which he made during the course of the psychiatric examination, could not be used against him as part of the prosecution's case at either phase of the trial unless it was necessary to rebut defense testimony? Did you consider at that time getting such an order?

A. No.

* * * *

Q. The record indicates that on September 28, you moved or asked the Court to grant a motion for a further psychiatric examination by Doctor Pile. Could you explain what your thinking was at that time and what your purpose was in seeking this additional evaluation after the evaluation by Doctor Dimitris and his staff at Central State?

A. I think it was, basically, I still was—I was dissatisfied even with Doctor Dimitris' report and I felt that even at worst, that the next psychiatrist would, more or less, support Doctor Dimitris' report in his finding and diagnosis, or he might find some other mental disorder that Doctor Dimitris didn't find. And then I was still—I still had this gnawing thing about the facts of the crime and the fact that both doctors that he had gone to previously, both psychiatrists had said that he was of sound mind. I was still looking into that, still—

Q. You still had your own doubts about that?

[244] A. I still had my own doubts.

Q. When you specifically requested the Court to grant an additional evaluation by, or support an additional evaluation by Doctor Pile, why did you specifically take Doctor Pile?

A. Well, I think by—I had heard of Doctor Pile by fellow attorneys I had talked—talked to, and I understood that he had done that type of work for the Court and for defense attorneys. And—I knew he was in charge of this Bayberry Psychiatric Clinic, and I felt that he was qualified to do it. There was nothing personal that I knew about Doctor Pile other than what I had heard about him.

Q. Before the examination itself, which, I think, was on October the 1st, did you have any conversation with Doctor Pile concerning this—the fact that you were requesting such an order and regarding the purpose of such an examination?

A. I remember calling the office. I remember talking to Doctor Pile or someone on the staff, and I introduced myself and told them about the entry of the order, and they would be receiving it from the Court.

Q. Whoever you talked to, that was the extent of the conversation, to notify them this order would be entered?

[245] A. Yes.

Q. I'm going to go over the same material concerning your advice to Michael Smith regarding this evaluation that we covered with Doctor Dimitris. First, did you specifically advise Michael Smith regarding whether he should make any disclosures or discuss the details of the offense, with which he was charged?

COURT: Mr. Bonnie, I thought Mr. Lowe asked him that question. Didn't you tell him who he talked to and who he shouldn't talk to?

MR. BONNIE: I'm sorry.

COURT: Somewhere back in your beginning of yours, you asked him the same question.

MR. BONNIE: I'm sorry. It seemed so long ago, I asked him the same question with regard to Doctor Dimitris' evaluation, and now I wanted to get specific information about Doctor Pile.

COURT: Doctor Pile, all right.

BY MR. BONNIE:

Q. Did you specifically advise him regarding the—the possible use of that information, with regard to Doctor Pile's evaluation?

A. I don't recall being specific with him and him not making a statement to Doctor Pile about any offenses. I don't remember telling him anything about [246] that. I had—I know I had—whenever he was—examined, I know that I would—we would talk, and he would ask me, you know—he would ask me what was happening, and I would tell him, and I would—I would sort of like to end on the note to keep everything that—that we know as happened, to himself. I did not specifically tell him not to say anything to Doctor Pile about the offense or any offenses.

A. Was it your expectation that he would not—that he would realize the advice that you had previously given him, the general advice not to discuss the details of the offense with

anyone except you was continued in effect with regard to this evaluation, was that your expectation?

A. Yes, that was my expectation.

Q. Did you have any concern about that expectation in light of the discussions that you had had with Doctor Dimitris concerning Mr. Smith's apparent willingness to discuss the details of that offense and prior offenses with him?

A. I didn't have any concern with it. I know that—after he had come back from Dimitris, being examined by Doctor Dimitris, I believe what happened was we were then—we were, at that time we were not appointed at the Circuit level, and I remember the incident of Mr. [247] Wood and myself and Mr. Smith, we went back into the room. And at that time, we discussed the matter of him talking to anyone again. And I think we tried to make it very clear at that time for him not to make any statements regarding any past offenses or the present offense. And I thought, based upon that, that he would not. And when he went to Doctor Pile, I had no idea that he would make any statements, and I felt at ease. I didn't worry about him not—him making a statement.

Q. Your expectation was that he would not. That as a result of this conversation here at the time you all were appointed at the Circuit Court level, that as a result of that conversation, he would not discuss the details of this offense or any previous offenses with Doctor Pile?

A. That's correct.

* * * *

[248] Q. Mr. Pugh, assuming that Michael Smith had followed your advice, had it occurred to you by this time that if he had done so, that an expert might not be able to render an opinion about the questions you were really trying to get him to address?

A.—No.

Q. Again, did it—had it occurred to you by this time that perhaps it would be useful to get a protective order, in order to facilitate disclosures by the client, and yet protect his Fifth Amendment rights?

A. It didn't occur to me.

Q. I should also clarify something that I was assuming from your prior testimony. Were you aware, in giving this advice to Michael Smith, that he should not discuss the context of the offense, details of the offense with anyone, were you aware of the Gibson versus Commonwealth decision, 216 Virginia 412, 1975?

A. I was aware that whatever he told [249] the psychiatrist could be admitted in Court.

Q. Okay.

A. I wasn't aware of that particular case.

Q. Okay, that stand for that proposition. At least at that time it did. Did you meet with Mr. Smith in close proximity to the time he went to see Doctor Pile, in order to re-enforce the advice you just described?

A. I don't recall.

Q. Did you accompany him to Doctor Pile's office, for example?

A. No, I did not.

Q. Did you, at any time before Doctor Pile conducted this evaluation, bring to his attention the specific provisions of the capital sentencing procedures that I referred to earlier?

A. No, I did not.

Q. The record shows that Doctor Pile sent you a report, dated October—excuse me, sent a report to the Court, dated October 1, which, copies of which were sent to you and the Commonwealth's Attorney. What were your reactions when

you received this report? And I can show it to you to refresh your memory.

A. Is that the letter he wrote me?

[250] Q. The letter he wrote, dated October 1st, his report. Do you recall that? Would you describe your reaction?

A. My reaction, I was shocked; I was upset. And I think shocked and upset sums it up.

Q. Were you satisfied?

A. No, I wasn't.

Q. Why were you dissatisfied?

A. I was dissatisfied mostly with the diagnosis. Primarily, I was dissatisfied with the information in the letter with reference to an incident on the bus. I was very dissatisfied with that.

Q. Why—

A. And then I was dissatisfied with myself for having selected Doctor Pile.

Q. Why were you particularly dissatisfied and shocked, angry, with regard to the incident on the bus?

A. Because I had never, in my conversations with Mr. Smith, I had never heard of the incident before. It was new to me, and it came as a shock to me. And based upon getting the letter, I believe I—I went over and I talked to Mr. Smith about that particular incident.

Q. What particularly made you angry, [251] frustrated, dissatisfied with the diagnosis that was the other factor that you mentioned?

A. Well, I could not phantom in my mind how he could have come back with a diagnosis of that nature when he had only examined him for a short period of time, whereas Doctor Dimitris had him up in Central State for a period of forty-five days and had a different diagnosis.

Q. Were you also concerned about these matters because the report was in the hands of the Commonwealth Attorney as well as your own?

A. I felt at that particular time that, after having read the letter, and I know—I believe Mr. Wood did too, we felt that at that time Doctor Pile would be called as a witness for the Commonwealth because of the information in there relating to that incident on the bus. As well as the diagnosis. Not so much the diagnosis. More about the incident on the bus, I was thinking.

Q. In retrospect, do you think you should have considered getting or seeking a protective order of the type that you—we discussed before?

* * * *

[252] COURT: For the record only, but [253] without any—looking back at it, Mr. Pugh, is it safe to say you would have done all these things if you thought about it?

A. Yes.

* * * *

[254] Q. Let's move to the trial itself, or at least the sentencing phase of it. Did you plan to call Doctor Pile, for example, as your witness?

A. For which stage?

Q. At the sentencing phase, did you plan on calling Doctor Pile as your witness?

A. No.

[255] Q. Again, at the risk of belaboring the obvious, would you state why not?

A. Well, I felt his—the information that he would testify to would be damaging, but you have to remember—

Q. Specifically—

COURT: Let him answer the question.

A. But you have to remember, and I don't—looking back two years ago, a lot of things I don't know why I did a certain way because of the case and what was going on, but—

COURT: The most honest answer that has been given in this Courtroom today.

A. But I know it was a lot of things going in my mind about Doctor Pile. I did not feel his testimony would benefit Mr. Smith.

BY MR. BONNIE:

Q. It was—you clearly had made the decision not to call Doctor Pile as your witness, is that right?

A. I was not going to call Doctor Pile.

Q. And you said that you—the reason, one of the reasons was that you did not think his testimony would be helpful and it would be damaging. What [256] specific respect were you concerned that his testimony would be damaging?

A. Well, with reference to the sentencing phase, we knew the accused had prior offenses, and history could be introduced at the sentencing stage of the trial. The incident on the bus would, in my thinking, be harmful to Mr. Smith. The diagnosis would have been harmful.

Q. When did you first become aware that the Commonwealth was going to call Doctor Pile, summons Doctor Pile, and call him as his witness at the capital sentencing stage?

A. I can answer that by saying that once I received Doctor Pile's report, I had a feeling that the Commonwealth would call Doctor Pile. I do not know when I received information that the Commonwealth would call Doctor Pile.

Q. Did you subpoena Doctor Dimitris as a defense witness at the capital sentencing phase?

A. I don't recall.

Q. You don't recall whether you did, or do you recall deciding that you did not want to?

A. What Doctor Dimitris said, we felt, was not that injurious to Mr. Smith. I don't recall.

Q. All right.

A. I knew he would be called by the [257] Commonwealth. I had—through the discovery, they had given us, Commonwealth's Attorney had given us a list of witnesses that he anticipated on calling. At that time, when we first obtained that list, Doctor Pile, of course, his name was not on there, because he wasn't even in the picture at that particular time.

Q. If the Commonwealth had not put on Doctor Dimitris, even though he had been subpoenaed at the capital sentencing phase, would you have called him as your own witness?

A. Probably, yes.

Q. Did you consider at that time, maybe I should put it in that context. Did you consider at that time what you would do if or was it just clear to you that the Commonwealth was going to put him on?

A. I felt the Commonwealth was going to put him—put Doctor Dimitris on.

Q. Okay. On direct examination, Mr. Person asked Doctor Pile, as you expected, about the bus incident. Then on cross examination, you asked him about his diagnosis. And I can get the transcript out to read it, but essentially the question was pretty clearly, "What was your diagnosis, Doctor?" Why did you do that? Do you recall what your thinking was at that time, why you did that, in light of all that we have been [258] discussing here in your testimony?

A. I really can't recall why I did it. I think at that time I was so wrapped up in the trial—I know we had—I know there was some discussion briefly with Mr. Wood about the doctors' testimony, that is Doctor Dimitris and Doctor Pile, but why I

asked that, I don't know. I think maybe, you know—thinking back, now looking at it, probably because I—you know, I still was thinking about the time in which Doctor Pile had spent with Mr. Smith. And if I am not mistaken, I think Doctor Dimitris had testified and had said what he had to say with reference to the time and what he had diagnosed, and—I know all of that was running through my mind. I really can't say why. I think maybe that was it.

Q. Let the record—I think the record will show Doctor Dimitris testified after Doctor Pile did, and the only thing that had come out at that time had been the bus incident on the Commonwealth's testimony. And you—I guess your testimony is you don't know why you asked Doctor Pile the question that you asked him.

A. Basically, yes.

* * * *

[259] EXAMINATION

BY MR. CULP:

Q. Mr. Pugh, you indicated you had as opportunity to talk with Mr. Smith seven or more hours about the case, incidents, how it occurred, and this sort of thing.

A. Yes.

Q. Did you have a full opportunity to discuss with Mr. Smith everything about how it occurred, what his version was and go into any grounds of defense he might have?

A. Yes, I did.

Q. And during any of these discussions, was he able to relate to you in a manner, in which you could understand, what his version was?

A. Yes.

Q. Were you able to converse with him so that you felt that he could understand what you were talking about?

A. Yes.

Q. Now, you said you talked with Mr. Smith about not discussing the case with anyone. Did you do that on more than one occasion, or just one occasion?

A. More than one occasion. I remember [260] two vivid times. That is when I was appointed and also when I was—when I was appointed at the preliminary, prior to the preliminary hearing, and also, I believe, it was the same day that Mr. Wood and I were reappointed in this Court.

Q. Did you talk to Mr. Smith prior to the time he was going to be examined by Doctor Dimitris and Doctor Pile as to—that he would be going down for an examination, or did you have any discussion with him at all?

A. Yes, I discussed with him that he was going. I think on each time when he was examined, prior to that examination, I told him what—was going on and what to expect, as far as the examination that "A doctor will examine you in reference to your sanity and competency to stand trial," and—and that—and things of that nature.

Q. Did he raise any objection to doing that?

A. No.

* * * *

[261] Q. You also asked the Court to give you a private psychiatric examination, after Mr. Smith had been to Central State, and the Court did that, did it not?

A. Yes.

Q. And you were the one that chose the psychiatrist?

A. That's correct.

* * * *

[264] Q. When you went down and talked to Doctor Dimitris, did you have occasion to discuss with him possibilities of mitigation?

A. Yes, I do remember talking with [265] Doctor Dimitris with reference to treatment for an individual diagnosis, having an inadequate personality, and you want me to tell you what he said?

Q. Yes, you can answer.

A. Okay, well, Doctor Dimitris indicated to me that it would be left up to that particular individual. He also expressed to me his belief that, you know—everyone has a degree of inadequate personality in some respect. That it wasn't something that was—that happens overnight. That it's a long term process, and some individuals have a greater, let's say, inadequate personality as opposed to others. And he indicated also that—that treatment would be left up to the individual, how that individual responded to treatment, cooperated.

Q. But he indicated to you that persons with inadequate personality could be treated?

A. Yes.

Q. Now, you answered that when the Court orders were entered, you did not seek a protective order to protect anything that he might say. You said you didn't consider that. Can you tell us why you didn't consider that?

A. Which one, on all of them?

Q. Any time you got the protective—I mean any time you had the order entered for the examination, [266] the record shows there was no protective order sought by you, and I think you testified you had not sought one. Can you give us an explanation of why?

A. Well, my main reason, I would imagine, was that I had talked with Mr. Smith with reference to him not making any statement, reference prior offenses that he may have com-

mitted or present offense. And it was my thinking, after talking with him, that he had understood what I had said, and that he would not make any further or make any statements whatsoever about any prior offense.

Q. Would it be fair to say, then, that you didn't feel it was necessary to get an order, because you had already advised him not to make any such disclosures?

A. Yes.

Q. Now, you testified today that you had this discussion with Doctor Dimitris, and you outlined generally what you talked about. What you testified to, that's not everything that you all discussed, is it?

A. No. We talked for—I know it had to be over an hour, an hour, over an hour, and we talked about—different things, a lot of things. As I said, he gave me certain examples, which I can't recall now, and things along that nature.

[267] Q. You knew when the trial came up that both Doctor Pile and Doctor Dimitris would be called to testify by the Commonwealth?

A. Yes.

Q. You weren't surprised by their appearance?

A. No.

* * * *

[269] Q. Mr. Pugh, at the time of the appeal, I believe the record would show that you did not assign any grounds for error on the basis of the Fifth Amendment privilege in Doctor Pile's or Doctor Dimitris' examination of Mr. Smith.

A. That's correct.

Q. And do you have the reason that you can give the Court for why you did not make any such assignment of error?

A. Yes. We—in particular, in reference to the statements introduced by Doctor Pile and the [270] objections on that, we

did not feel that Virginia case law would support our position at that particular time. There was no immunity between what Doctor Pile said or testified to that I knew of at that time that we could claim. The law clerk, in fact, did some research on what we did. We had the various objections that we were going to raise to the Supreme Court of Virginia, sort of underlined each objection that we made during the course of the trial, thinking to make that an appealable point, and we didn't find—we didn't think at that time there was any merit to that particular claim.

* * * *

[273] REDIRECT EXAMINATION

BY MR. BONNIE:

Q. First, in connection with the question of preserving an objection to Doctor Pile's testimony concerning the bus incident on the Fifth Amendment grounds, you said that you didn't think you had anything under Virginia law to go on. Did you, in deciding what to do about that objection, research the Federal case law, Fourteenth Amendment case law on that question?

A. I did not.

Q. Do you know—are you aware that anyone, your research assistant or Mr. Wood, whether they had? Did you all discuss it?

A. We discussed it. Jim Updike and [274] myself, and he did do some research on it. Whether or not it was Federal case or not, I don't know, but I know the results of it was that it was a decision that—it wasn't—it didn't merit—

* * * *

VIRGINIA: IN THE CIRCUIT COURT
OF THE CITY OF WILLIAMSBURG
AND COUNTY OF JAMES CITY

MICHAEL MARNELL SMITH,

Petitioner

v.

EDWARD C. MORRIS,
SUPT. MECKLENBURG CORRECTIONAL CENTER,

Respondent

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Filed: April 16, 1980

On November 2, 1977, petitioner Michael Marnell Smith was convicted by a jury of capital murder following rape under Va. *Code Ann.* § 18.2-10(a) and -31(e) (Cum. Supp. 1977). On November 3, 1977, pursuant to the bifurcated capital trial proceedings prescribed by *Va. Code Ann.* § 19.2-256.2 *et seq.* (Cum. Supp. 1977), the jury recommended the sentence of death, which, after review, was imposed by this Court on November 30, 1977. The conviction and sentence were unsuccessfully appealed. *Smith* v. *Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978); *cert. denied*, ____ U.S. ____, 99 S.Ct. 2419, (1979). On June 22, 1979, petitioner filed a writ of habeas corpus with this Court, alleging ineffective assistance of counsel during his trial. For the reasons set forth below, the petition is denied.

* * * *

I

Petitioner's first claim centers on the admissibility during the sentencing phase of the trial of certain statements he made

during a pretrial psychiatric examination. On October 1, 1977, by order of this Court pursuant to petitioner's request for an evaluation by a psychiatrist of his own choosing, petitioner underwent a one-hour psychiatric examination by Dr. Wendell Pile. In a letter to this Court dated October 1, 1977, Dr. Pile described an account by petitioner of a previously undisclosed incident which occurred in his youth. The letter relates that petitioner, a school bus driver at the time, once tore the clothes off a girl, but on second thought, decided not to rape her. At the sentencing phase of the trial, petitioner's counsel objected to an attempt by the prosecution to elicit on direct examination this account by Dr. Pile on the grounds that during the examination Dr. Pile failed to inform petitioner that his statements could be used against him. This Court overruled, noting that Dr. Pile's examination occurred at petitioner's request.

Referring to the psychiatric examination itself, Dr. Pile at the beginning of said examination, encouraged petitioner to make a full disclosure of the offense and any prior offenses. Petitioner advised Dr. Pile that his attorney had told him not to discuss the offense or any prior offenses in which he had been involved. Thereafter, Dr. Pile did not press petitioner for information, but during the interview petitioner told Dr. Pile of the incident on the bus as recited above.

Thus, the Court finds that petitioner was carefully advised by his attorney not to discuss the offense with anyone and also not to divulge anything about prior offenses, that petitioner was fully aware of this advice when he was examined by Dr. Pile and exhibited such knowledge when he advised Dr. Pile that his attorney had told him not to discuss any past offenses, and that petitioner voluntarily waived his right against self-incrimination.

Turning now to the case law discussed by petitioner in support of his first claim, petitioner refers to two recent decisions dealing with the issue raised. The first case, *Gibson* v. *Zahradnick*, 581 F.Ed 75 (4th Cir. 1978) overturns the decision in *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975),

in which Supreme Court of Virginia held that the prosecution may use on the issue of guilt statements made without prior warning during a psychiatric examination, so long as the accused was not compelled to answer questions concerning the offense with which he was charged. The court in *Gibson* v. *Zahradnick*, *supra*, disagreed, reasoning that an adequate evaluation of an accused's sanity at the time of the offense or of his competency to stand trial cannot be made absent a candid disclosure to the examiner of the facts surrounding the offense. Thus, the court held that in order to preserve his Sixth Amendment right to explore these psychological defenses, the incriminating statements an accused makes concerning the offense may not be used by the prosecution to prove his guilt. To adapt this holding to the present case, petitioner analogizes that proof of guilt in a normal criminal trial is the functional equivalent of the prosecution's proof of case-in-aggravation in the sentencing phase of a capital trial.

The second case, *Smith* v. *Estelle*, 602 F.2d 694 (5th Cir. 1979), involves the introduction of psychological testimony during the sentencing phase of a bifurcated capital trial. There, on the trial court's motion the prosecution obtained a psychiatric examination of the accused, but failed to inform him before or during the examination of his Fifth Amendment right against self incrimination. Having never disclosed the existance of this examination to the defense, the prosecution called the psychiatrist to testify on the issue of dangerousness in support of the state's case-in-aggravation. The court, *supra*, held the testimony inadmissible on two grounds: first, its introduction constituted unfair surprise, and second, in the absence of a warning against self-incrimination, the accused made no voluntary waiver of his Fifth Amendment rights.

Focusing on the merits of the first claim, I find that neither decision above adequately supports petitioner's claim such that there would be a reasonable and sufficient certainty of success on appeal. *Gibson* v. *Zahradnick*, *supra*, narrowly considers the admissibility of statements relating directly to the circum-

stances of the offense charged, and their use by the prosecution to prove guilt. It does not consider the use of statements to prove mental state, nor does it draw the analogy between proof of guilt and proof of case-in-aggravation.

Further, since unfair surprise is not in issue in the present case, *Gibson* v. *Zahradnick* forecloses further argument based on *Smith* v. *Estelle*, *supra*. The alternative analysis employed in *Smith* v. *Estelle* with regard to the admissibility of incriminatory statements is the same Fifth Amendment voluntariness of waiver analysis that the Supreme Court of Virginia employed in *Gibson* v. *Commonwealth*, *supra*, and which was ultimately rejected in *Gibson* v. *Zahradnick*. The court in *Gibson* v. *Zahradnick* reasoned instead that the Sixth Amendent right to explore psychological defenses demands a full inquiry, uncompromised by the threat of self incrimination, into defendant's mental state. The court's holding that the prosecution is prohibited from using such incriminatory statements to prove defendant's guilt was based on a finding that defendant's Sixth Amendment rights were violated, and not on a finding of absence of voluntary waiver.

More importantly, however, both *Gibson* v. *Zahradnick* and *Smith* v. *Estelle* were decided after petitioner's trial. Thus, regardless of their usefulness in theory to sustain an appeal, neither was in fact available to counsel when needed. Further, testimony shows that an assistant of counsel conducted research on the Fifth Amendment issue, but that his unpromising results led counsel to decide not to appeal. [Evidentiary hearing tr. at 270 and 274.] In light of these facts and of the differences noted above, I find sufficient reason for counsel not to have raised on appeal the arguments presented here. I thus conclude that counsel exercised reasonable judgment in deciding not to preserve the objection of appeal, and that this decision resulted from informed, professional deliberation in conformity with the standards of competence discussed above.

In other claim relating to statements made during the psychiatric examination, petitioner contends that his counsel

incompetently failed to recognize the conflicts between his advice to petitioner to remain silent about the offense charged and his attempt through psychiatric examination to explore possible psychological defenses. Petitioner's claim presumes that such defenses cannot be probed in the absence of statements by the accused concerning the circumstances surrounding the offense. On this issue, the opinions of expert witnesses were in opposition [Evidentiary hearing tr. at 80 and 180-182], as appear to be the underlying presumptions in the decisions of *Gibson* v. *Zahradnick* and *Smith* v. *Estelle*, discussed *supra*. I find adequate support for counsel's conduct within the present state of disagreement, both in the medicial and legal professions, on this matter. I thus conclude that counsel's advice to petitioner to remain silent about the offense during his psychiatric examinations was not inadequate representation under the *Slayton* or *Marzullo* standards quoted above.

* * * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CASE NO. 82-484-N
Filed June 30, 1982

MICHAEL MARNELL SMITH,
Petitioner

v.

EDWARD C. MORRIS, Superintendent,
Mecklenburg Correctional Center
Post Office Box 500, Boydton, Virginia 23917,
Respondent

PETITION FOR A WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Petitioner, Michael Marnell Smith, by his counsel, and represents unto the Court that he is illegally held, under sentence of death, in the custody, confinement and restraint of the Respondent and his agents and employees, at the Mecklenburg Correctional Center of the Virginia Department of Corrections, located in Boydton, in the County of Mecklenburg, Commonwealth of Virginia, and that his confinement under sentence of death is illegal for the reasons set forth below. The jurisdiction of their Court is invoked pursuant to 28 U.S.C. § 2254.

* * * *

IV. THE INTRODUCTION BY THE PROSECUTION OF INCRIMINATING AND ADVERSE PSYCHIATRIC TESTIMONY ON THE ISSUE OF PETITIONER'S FUTURE DANGEROUSNESS AT HIS CAPITAL SENTENCING TRIAL VIOLATED HIS PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

44. By order dated July 1, 1977, Petitioner was ordered to undergo psychiatric evaluation by Dr. James C. Dimitris and the staff of the Forensic Unit of Central State Hospital, employees of the Virginia Department of Mental Health and Mental Retardation. Pursuant to this order, Petitioner was hospitalized from July 5, 1977, to August 23, 1977.

45. By order dated September 28, 1977, Petitioner was ordered to undergo psychiatric evaluation by Wendell J. Pile, M.D., a private psychiatrist appointed by the Court, this examination being conducted on October 1, 1977.

46. Petitioner was not told by Dr. Pile before or during his examination that his statements during the examination could be used against him at either the guilty or capital sentencing phase of his trial.

47. Petitioner was not told by either Dr. Dimitris or Dr. Pile before or during their respective examinations that he had a right to consult with his counsel and/or to have counsel present during the examination.

48. Petitioner was not told by either Dr. Dimitris or Dr. Pile before or during their respective examinations that he had a right to remain silent concerning the alleged offense with which he had been charged or any prior criminal offenses.

49. Petitioner was not told by either Dr. Dimitris or Dr. Pile before or during any clinical interviews that he had a right to terminate the interview at any time.

50. No circumstances pertaining to either evaluation provided notice to Petitioner that these examinations had any

adversarial purpose or that his statements to Dr. Pile or Dr. Dimitris or the staff of Central State Hospital could form the basis of, or be used as evidence to support, a determination that he should be put to death.

51. Both Dr. Pile and Dr. Dimitris encouraged Petitioner to disclose the details of the offense for which he had been indicted and the details of any prior criminal conduct whether or not such conduct had led to any conviction.

52. On the basis of their respective examinations and as required by court orders, Dr. James Dimitris and Dr. Wendell J. Pile sent reports, dated August 8, 1977, and October 1, 1977, respectively, to the Circuit Court of Williamsburg and James City County, with copies to the Commonwealth's Attorney and Petitioner's trial attorneys.

53. Petitioner did not plead "not guilty by reason of insanity" or attempt to introduce any psychiatric evidence at the guilt phase of his trial for capital murder.

54. After Petitioner was convicted of capital murder, Petitioner's trial attorneys did not intend to call Dr. Wendell J. Pile as a witness on Petitioner's behalf at the capital sentencing phase of his trial.

55. At the capital sentencing phase of Petitioner's trial on November 3, 1977, the Commonwealth called Dr. Wendell J. Pile as its witness and, on direct examination and over Petitioner's objection, Dr. Pile was permitted to testify about statements made by Petitioner during the examination described in paragraph 45, above, concerning episodes of alleged anti-social behavior which had not previously been disclosed to the jury.

56. Although Petitioner's trial attorneys were prepared to call Dr. James Dimitris as a witness on Petitioiner's behalf at the capital sentencing phase of his trial, the scope of such testimony would have been restricted to Dr. Dimitris' diagnosis of Petitioner's psychological abnormality and the degree to which any such abnormality impaired his ability to control his behavior or appreciate the wrongfulness of his conduct.

57. At the capital sentencing phase of Petitioner's trial on November 3, 1977, the Commonwealth called Dr. Dimitris as its witness and he was permitted to testify regarding the likelihood that Petitioner would engage in serious criminal acts of violence in the future.

58. Petitioner was unwittingly induced to provide, by his own statements, the only evidence offered by the prosecution, other than his record of prior conviction and the circumstances of the present offense, which purported to suggest that he might be dangerous in the future and should therefore be put to death.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION 82-484-N
Filed March 6, 1984

MICHAEL MARNELL SMITH #113176,
Petitioner,

v.

RAYMOND K. PROCUNIER, Director of the
Virginia Department of Corrections,
Respondent.

MAGISTRATE'S PRELIMINARY REPORT

* * * *

IV

Petitioner next asserts that the introduction by the prosecution of incriminating and adverse psychiatric testimony on the issue of petitioner's future dangerousness at his capital sentencing trial violated his privilege against self-incrimination under the Fifth and Fourteenth Amendments. See Appendix, paragraphs 26 and 44-58, pages 12-14, for a complete statement of grounds under this heading.

These grounds were not raised on direct appeal nor were they addressed on the merits by the Supreme Court of Virginia. Consequently, it is concluded that the issues raised under this heading are subject to the doctrine of procedural default.

Even though all claims under this heading were asserted in petitioner's state court habeas corpus petition, the state habeas trial court specifically declined to address any allegations under this heading precisely because the allegations had

not been raised at trial and were therefore "waived and forfeited."

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 82-484-N

MICHAEL MARNELL SMITH,

Petitioner(s),

v.

RAYMOND K. PROCUNIER, Director of the
Virginia Department of Corrections,

Respondent(s).

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision having been duly rendered,

It is ADJUDGED and ORDERED that this action be dismissed.

W. FARLEY POWERS, JR., Clerk

/s/ ANN F. RIVES
Ann F. Rives, Deputy Clerk

Date: December 4, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 82-484-N

MICHAEL MARNELL SMITH,

Petitioner

v.

RAYMOND K. PROCUNIER, Etc.,

Respondent

ORDER

This matter was initiated by a petition for writ of habeas corpus under 28 U.S.C. § 2254.

The petition alleges violations of federal rights pertaining to Mr. Smith's conviction for capital murder on November 30, 1977 in the Circuit Court of the City of Williamsburg and County of James City, as a result of which petitioner was sentenced to death.

This matter was referred to a United States Magistrate for report and recommendation pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 29(A)(1) and (N)(3)(f) of the Rules of the United States District Court for the Eastern District of Virginia. The magistrate filed three preliminary reports on March 6, 1984, March 30, 1984 and April 9, 1984, respectively, dealing with various aspects of the petition. A final report of the magistrate, incorporating the preliminary reports, was filed on August 31, 1984. The final report recommended dismissal of the petition. By copy of the final report, each party was advised of his right to file written objections to the findings and recommendations made by the magistrate.

The Court received from petitioner's counsel Exceptions to Magistrate's Reports filed on September 17, 1984. The Court having examined petitioner's exceptions and having made *de*

novo findings with respect to the portions objected to, does hereby adopt and approve, with the one exception discussed below, the findings and recommendations set forth or incorporated in the final report of the United States Magistrate filed August 31, 1984. It is, therefore, ORDERED that the petition be DENIED and DISMISSED and that judgment be entered in favor of the respondent.

This Court's only point of divergence from the Magistrate's findings stems from the Magistrate's reluctance to follow *Carrier* v. *Hutto*, 724 F.2d 396 (4th Cir. 1983) on an issue regarding procedural default. Although the Magistrate acknowledged in his third report that *Carrier* supported petitioner's position on a question of procedural default, he found *Carrier's* future application unclear and held that the case would not be followed in this matter. The Magistrate felt it the better course of action to follow what he deemed was the Supreme Court's stance on this issue, as deduced from *Engle* v. *Issac*, 456 U.S. 107, 129-35 (1982). As set forth below, this Court finds that even analyzing all of petitioner's applicable claims under *Carrier*, they remain barred by procedural default.

Carrier v. *Hutto*, *supra*, held that attorney error short of wholesale ineffectiveness of counsel can satisfy the "cause" prong of the "cause and prejudice" test defined in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), provided that the act or omission causing the procedural default emanated from ignorance or inadvertence, rather than deliberate strategy. *Carrier*, 724 F.2d at 401. *Carrier's* holding primarily addresses trial objections mistakenly omitted on appeal, or appellate claims which should have been, but were not, raised.

Petitioner's procedurally defaulted claims do not fall under the *Carrier* exception. Petitioner's barred claims involve, for the most part, challenges by his habeas counsel to the Virginia capital punishment statute and its sentencing procedures which were not raised by petitioner's original counsel at his trial and direct appeal. Specifically these claims are: (1) the Virginia capital sentencing procedure is unconstitutional on its

face and as applied under the Eighth and Fourteenth Amendments (heading I); (2) application of the statute in his case gave presumptive effect to the jury's finding of either of two statutory aggravating circumstances and devalued his mitigating evidence, thereby depriving him of his right under the Eighth and Fourteenth Amendments to an individualized determination (heading II); (3) application of the present Virginia death penalty procedures have resulted in an arbitrary and discriminatory pattern of imposing the death penalty (heading III); (4) the procedures for appointing and compensating indigent counsel for capital defendants create a substantial likelihood that such defendants' Sixth and Fourteenth Amendment rights will be violated (heading VI); (5) imposition of the death penalty by electrocution is unnecessarily cruel and thus forbidden by the Eighth and Fourteenth Amendments (heading IX); and (6) the death penalty is excessive punishment in petitioner's case (heading X). Petitioner's other procedurally barred claim involves the admission of psychiatric testimony at his sentencing (heading IV). That claim is clearly barred under *Wainwright* and *Carrier*, because as stated at petitioner's state court habeas proceeding, the default resulted not from the trial attorney's ignorance or inadvertence, but because of a deliberate tactical decision. *See Wainwright*, 433 U.S. at 77, 82-83, 85; *Fay* v. *Noia*, 372 U.S. 391, 438-39 (1963); *Carrier*, 724 F.2d at 401.

Returning to petitioner's above numbered contentions, while these claims are hardly frivolous, they are not the type of omissions to which *Carrier* speaks. Furthermore, the claims are not so novel that their legal basis was not reasonably available to petitioner's original counsel, nor has there been a recent Supreme Court reversal of earlier cases dealing with these issues which would constitute cause for their not being raised at trial and on direct appeal. *See Reed* v. *Ross*, 104 S.Ct. 2901 (1984).

Even if one could somehow find that the failure of petitioner's original counsel to raise the above numbered claims constituted

attorney omission satisfying the "cause" requirement under *Carrier*, there is no indication that omission of these claims satisfies the "prejudice" requirement enunciated in *Wainwright* v. *Sykes*, *supra*. To satisfy the prejudice exception there must be actual, not possible, prejudice resulting in "actual and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions. *United States* v. *Frady*, 456 U.S. 152, 170 (1982). In light of the overwhelming evidence of petitioner's guilt and the jury's careful deliberation over his sentence, the failure of petitioner's original counsel to raise these issues did not result in actual prejudice satisfying the *Wainwright* requirement. As an aside, this Court notes that virtually all of these issues have been raised by previous habeas petitioners, and have been dismissed on the merits. *See e.g. Briley* v. *Bass*, 584 F.Supp. 807, 819 (E.D. Va. 1984) (Virginia death penalty statute constitutional) *aff'd* No. 84-6243 (4th Cir., August 23, 1984).

The Court therefore concludes that even under *Carrier* v. *Hutto*, *supra*, petitioner's claims remain procedurally barred. Accordingly, to the extent that the petition is based on claims set forth in its paragraphs numbered 23 and 33 (under heading I), paragraphs 24 and 36 (under heading II), paragraphs 27 and 59 through 73 (under heading V), paragraphs 29, 82 and 83 (under heading VII), and paragraphs 30, 69 and 90 (under heading VIII), it is DISMISSED on the merits.

To the extent that the petition is based on any other claims, it is DISMISSED on the basis of petitioner's procedural defaults in the state courts.

Petitioner may appeal from this *final order* by filing a *written* notice of appeal with the Clerk of this Court, Room 307, 600 Granby Street, Norfolk, Virginia 23510, within thirty (30) days from this date. For the reasons stated or incorporated in said final report to the Magistrate, the Court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of probable cause for appeal.

/s/

United States District Judge
Norfolk, Virginia
December 4th, 1984.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-4001

MICHAEL MARNELL SMITH

Appellant,

v.

RAYMOND K. PROCUNIER, Director
of the Department of Corrections,

Appellee.

Appeal From The United States District Court For The Eastern District Of Virginia, At Norfolk. John A. MacKenzie, Chief Judge. (CA 82-484-N)

Argued: April 5, 1985 Decided: May 10, 1985

Before WIDENER and MURNAGHAN, Circuit Judges and WARRINER, United States District Judge for the Eastern District of Virginia, sitting by designation.

MURNAGHAN, Circuit Judge:

It has not infrequently been observed that there must be a better, more expeditious, way for dealing with cases which present the most stressful and distressful decisions with which a judge or panel of judges may be faced, namely, those involving appeals from denials of *habeas corpus* relief to criminal defendants convicted and sentenced to die. The offense here occurred on May 23, 1977. Michael Marnell Smith was convicted by a jury in James City County, Virginia on November 2, 1977 for the capital murder and rape of a young woman. On the following day, November 3, 1977, the jury heard evidence at the penalty/sentencing phase and recommended a sentence of

death. In doing so, the jury had before it the Commonwealth's claim that there were two separate aggravating circumstances, one of dangerousness, the other of vileness. The jury found separately, with respect to each aggravating circumstance, that it alone merited imposition of the death penalty.

There followed the usual panoply of legal maneuvers:

1. An automatic appeal to the Supreme Court of Virginia, which affirmed the conviction and the death sentence. *Smith* v. *Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978).

2. A denial by the Supreme Court of the United States of a petition for a writ of certiorari. *Smith* v. *Virginia*, 441 U.S. 967 (1979).

3. A denial of a state court petition for writ of *habeas corpus* on March 14, 1980 following an evidentiary hearing on Smith's claim that there had been ineffective assistance of counsel.

4. The filing, on June 28, 1982, of a petition in the United States District Court for the Eastern District of Virginia for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. A magistrate issued a written report proposing dismissal of the petition. On December 4, 1984 the district court did so.

Now, on appeal, the case reaches us on the following issues:

1. Whether a Fifth Amendment violation occurred when a psychiatrist, consulted at the instance of Smith's counsel, was wrongly permitted to testify in the sentencing phase of the case about incriminating statements concerning an earlier attack Smith described during the psychiatric interview.

2. Whether the assistance of counsel representing Smith at the sentencing phase was ineffective.

3. Whether jury instructions at the sentencing phase unconstitutionally compromised Smith's right to an individualized determination that death was the appropriate punishment.

It is evident that guilt is not contested. Smith questions solely the correctness of the sentencing procedures.

At the outset we are confronted with a contention by the Commonwealth that the absence of an objection by counsel to the psychiatric testimony under *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) foreclosed the making of the point. The case imposes a burden on the convict to show cause for and prejudice in the failure to raise the issue.

That question under *Wainwright* v. *Sykes* has plagued the Court in prior instances. Potentially it could do so here for there is reason to doubt whether counsel for Smith could muster sufficient reason to constitute trial counsel's failure to object inexcusable neglect. The testimony of a psychiatrist whose interview with Smith took place through the initial urging of defense counsel was under Virginia law proper, even though his testimony was severely damaging to the defendant. *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975). At the federal level, the law precluding such testimony on Fifth Amendment grounds, at the time of the trial in November 1977, was not certain. Only subsequently, in *Gibson* v. *Zahradnick*, 581 F.2d 75 (4th Cir. 1978), did the Fourth Circuit establish the impropriety on Fifth Amendment grounds of testimony concerning damaging remarks of the accused during a psychiatric examination.[1]

One difficulty is presented by the case of *Honeycutt* v. *Mahoney*, 698 F.2d 213 (4th Cir. 1983). There it was held that a lawyer could not be found to have afforded ineffective assistance where in October 1973 he failed to object to imposition on the defendant of the burden of proof. That the imposition was, indeed, improper was finally established by the Supreme Court in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). The

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[1] That is not to say, however, that there were not indicia of things to come which antedated the trial of Smith. *E.g.*, *United States* v. *Albright*, 388 F.2d 719 (4th Cir. 1968); *Gibson* v. *Zahradnick*, *supra*, at 78-79.

Supreme Court's decision came down two years after the trial had taken place. However, both the district court on September 29, 1972 and the decision of the First Circuit Court of Appeals on February 14, 1973 had announced the same rule of law, subsequently adopted by the Supreme Court, *before* trial took place in October 1973.[2]

Rather than take such an approach here, however, especially inasmuch as the continued vitality of *Honeycutt* v. *Mahoney* has been rendered uncertain by the recent decision of *Reed* v. *Ross*, ___ U.S. ___, 82 L.Ed.2d 1, 52 U.S.L.W. 4905 (1984), we give weight to the consideration that we have before us a matter of life and death. The imminent execution of Smith serves as sufficient grounds to review the issue raised on the merits.[3]Since our determination on the merits is that Smith is not entitled to *habeas corpus* relief, we thereby, without displaying substantial disregard for *Wainwright* v. *Sykes*, at least, avoid the nagging concern that one possibly meritorious grounds for avoiding the termination of Smith's life went unconsidered. *Cf. Carrier* v. *Hutto*, 724 F.2d 396 (4th Cir. 1983), holding that ignorance or oversight leading to the failure to raise a point on behalf of a criminal defendant may constitute cause sufficient to excuse failure to make a contemporaneous objection.[4]

On the merits, we immediately come up against the consideration that the jury's verdict recommending a death sentence was supported by two separate and distinct grounds of aggravation: (a) dangerousness (*i.e.*, violence) and (b) vile-

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[2] *Wilbur* v. *Robbins*, 349 F. Supp. 149 (S.D. Me. 1972); *Wilbur* v. *Mullaney*, 473 F.2d 943 (1st Cir. 1973).

[3] *See Hutchins* v. *Woodard*, 730 F.2d 953, 959 (4th Cir. 1984).

[4] At the same time, we feel it only fair to counsel who represented Smith to point out that the question is very clouded as to whether the representation he afforded his client was, in fact, ineffective or that any prejudice resulted. *See Strickland* v. *Washington*, ___ U.S. ___, 104 S.Ct. 2052 (1984).

ness.[5] The asserted errors of constitutional dimension relating to the admission of psychiatric testimony were in testimony directed to the question of "dangerousness."[6] The evidence presented to the jury supporting a showing of "vileness" was unchallenged. The testimony in the guilt phase of the case amply provided a basis for a decision that the crime was vile.[7] Having met the victim on a beach, Smith paused to help remove briars from her feet. The appearance of kindness immediately dissipated when Smith grasped the victim's arm, took her to a wooded area, produced a knife, and told her to undress. He then forced her to have intercourse and, following that, choked her, dragged her into the water, submerged her head, stabbed her, and left the dead victim lying where she fell. The immediate cause of death was drowning, although the testimony indicated that stab wounds and strangulation also could have been responsible.

This court recently decided in *Briley* v. *Bass*, 742 F.2d 155, 165 (4th Cir. 1984), that any one aggravating circumstance deemed sufficient by the jury suffices:

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[5] In the jury's verdict, the chameleon word "or" separates the finding of "probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society" from "his conduct in committing the offense is outrageously or wantonly vile." Any possible ambiguity is removed for us, however, by the determination of the Supreme Court of Virginia that "[t]he written verdict recited a finding of both aggravating circumstances." *Smith* v. *Commonwealth*, 219 Va. 455, 481, 248 S.E.2d. 135, 151 (1978). *Cf. Briley* v. *Bass*, 750 F.2d 1238 (4th Cir. 1984) where "shall" from the context was read as "may." Similarly, the context removes any doubt that "or" meant, and was understood to mean, "and."

[6] The psychiatrist testified that Smith volunteered information that at some time prior to the incident for which he here stood convicted he assaulted a girl on a school bus.

[7] In his instruction, the trial judge defined vile as torture, depravity of mind or aggravated battery to the victim.

> [S]ince the jury returned a verdict finding the death sentence warranted under both the "vileness" and the "dangerousness" standard, it is of no importance whether the instruction on "vileness" was correct so long as the instruction on "dangerousness" was correct, provided, of course, the verdict of the jury was unanimous on the "dangerousness ground."

Similarly, the Supreme Court in *Zant* v. *Stephens*, 462 U.S. 862, 884 (1983) stated that:

> [A] death penalty supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravated circumstance is "invalid" in the sense that it is insufficient itself to support the death penalty.

The effort is also made to depict Smith's trial counsel as ineffective for failure, having once elicited testimony that Smith was a sociopathic personality, subject to sexual deviation, to explore with two psychiatrists who testified the possibility that Smith suffered from a potentially mitigating mental incapacity. First, inquiry into the area meant resort to a double-edged sword, requiring the application of professional judgment whether to pursue a subject that already had proved unproductive. Second, counsel's professional wisdom in deciding not to do so was borne out because both psychiatrists have (at the state *habeas corpus* hearing) indicated that, had they been asked an opinion as to whether Smith suffered from a potentially mitigating mental incapacity, the answer in each case would have been negative.

Finally Smith's constitutional challenge to jury instructions at the sentencing phase as having deprived him of his Eighth Amendment right to an individualized determination that death was the appropriate penalty, *see Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978), runs up against contrary authority which is controlling. The constitutionality of the instructions of which Smith complains has been upheld by *Smith* v. *Commonwealth*, 219 Va. 455, 480, 248 S.E.2d 135, 150 (Va. 1978). Furthermore, in considering a similar instruction under the same Virginia statute, this court recently ruled that the instruction was not

constitutionally defective. *Briley* v. *Bass*, 750 F.2d 1238 (4th Cir. 1984). In the instant case, the language focused on as allegedly erroneous is: "if you find that other mitigating circumstances do not justify a sentence of death, you may fix the defendant's punishment at life imprisonment."[8] *Briley* v. *Bass* concluded that inclusion in the jury charge of "or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment . . . at life imprisonment" left the instruction free of constitutional error.

The messages conveyed to the juries in the two cases are not substantially different in meaning. The refutation of the appellant's contention in *Briley* v. *Bass* dictates the same result here. The use in the instant case of "may" instead of "shall" does not overcome the consideration that reading the instructions as a whole makes it altogether apparent that a finding that other mitigating circumstances did not justify a sentence of death necessitated rejection of the death penalty. Just as consideration of all the circumstances in *Briley* v. *Bass* converted "shall" to "may" in the statement "you shall fix the punishment of the defendant at death," so here "may" should be read as "shall."

Accordingly, we conclude that the action of the district court in dismissing the petition for a writ of *habeas corpus* should be, and it hereby is, affirmed.

Since execution is fixed for May 15, 1985, we grant a stay for a period of twenty-one (21) days from the filing of this opinion to permit the petitioner to apply to the Supreme Court or a Justice thereof for a further stay.

AFFIRMED.

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[8] A related instruction read: "that when determining the punishment to be imposed . . . you shall consider . . . any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to the following. . . ."

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-4001

Filed: June 26, 1985

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Widener and Judge Warriner, United States District Judge sitting by designation.

For the Court,

JOHN M. GREACEN
CLERK

SUPREME COURT OF THE UNITED STATES

No. 85-5487

MICHAEL MARNELL SMITH,

Petitioner

v.

ALLYN R. SIELAFF, Director, Virginia Department of Corrections

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ORDER ALLOWING CERTIORARI. Filed October 21, 1985.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, limited to Questions 1 and 2 presented by the petition.